No. 01-584-CFX Title: Wanda Adams, et al., Petitioners
v.
Florida Power Corporation and Florida Progress Corporation

Docketed:
October 5, 2001 Court: United States Court of Appeals for the Eleventh Circuit

Entry	Date	Proceedings and Orders
	Oct 3 2001	Petition for writ of certiorari filed. (Response due November 4, 2001)
	Oct 31 2001	Brief of respondents Florida Power Corporation, et al. in opposition filed.
	Nov 13 2001	Reply brief of petitioners Wanda Adams, et al. filed.
	Nov 14 2001	DISTRIBUTED for Conference of November 30, 2001
	Dec 3 2001	Petition GRANTED. SET FOR ARGUMENT March 20, 2002. **********
	Dec 24 2001	Order extending time to file brief of petitioner on the merits until January 24, 2002.
	Jan 7 2002	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioners and counsel for the respondents.
	Jan 23 2002	Brief amicus curiae of Academy of Florida Trial Lawyers filed.
	Jan 24 2002	Brief amicus curiae of National Employment Lawyers Association filed.
	Jan 24 2002	Brief amici curiae of American Association of University Professors, et al. filed.
	Jan 24 2002	Joint appendix filed.
	Jan 24 2002	Joint appendix in two volumes.
	Jan 24 2002	Brief of petitioners Wanda Adams, et al. filed.
	Jan 24 2002	Brief amici curiae of Cornell Univ. Chapt. of Am. Assn. of Univ. Professors, et al filed.
	Feb 11 2002	CIRCULATED.
	Feb 12 2002	Record filed.
	Feb 20 2002	Brief amicus curiae of Pacific Legal Foundation filed.
	Feb 22 2002	Brief amicus curiae of Equal Employment Advisory Council filed.
	Feb 22 2002	Brief amicus curiae of Chamber of Commerce of the United States of America filed.
	Feb 25 2002	Brief of respondents Florida Power Corporation, et al. filed.
	Feb 25 2002	Brief amicus curiae of Atlantic Legal Foundation filed.
	Feb 27 2002	Record filed.
	Mar 14 2002	Reply brief of petitioners Wanda Adams, et al. filed.
	Mar 20 2002	ARGUED.
	Apr 1 2002	Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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65 pp

QUESTION PRESENTED

The petitioners were fired as part of a corporate reorganization in which more than 70% of the persons fired were, like them, at least 40 years old. The court of appeals held that the Age Discrimination in Employment Act of 1967 did not under any circumstances permit a disparate impact method of proving age discrimination. The question presented is:

Is a disparate impact method of proving age discrimination available to plaintiffs suing under the ADEA?

PARTIES TO THE PROCEEDING IN THIS COURT

In addition to the persons named in the caption, the petitioners in this proceeding are James Akin, Linda Baldwin, Willis Barnes, Elaine Barnes-Foster, Philip Bassa, Larry Bayes, Patsy Baynard, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Earl Bettis, Richard L. Boreman, Jerold A. Boyle, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Donald P. Broeckel, Richard Brown, Lorin Bryan, Robert Bunch, Judith A. Carey, Thomas Catlett Jr., Charles Coffman, Marjorie Copeland, Kenneth Corbett, Earl Doby, Samuel Dupuy, Tom Engers, Gwendolyn Evans, Paul Fintak, Ray Forehand, Mark Foster, Gregg Frangipane, Robert Freeland, John Fremgen, Valerie Fronza, John Gallagher, Narendra Garg, Mickey Gauldin, Polly Gillespie, Ralph Graves, Linda Groseclose, Michael Harmeling, Thomas Hays, Eugene Hayward, Gopal Hegde, David Hodgson, Peter Holliday, Roy C. Hooks, William E. Hoover, Dayton Jackson, Douglas Janowski, Carrie Jones, William Kenefik, Stephen Koon, Gerald Lamm II, Kermit Lassiter, Saranan Lauck, Thomas Livingston Jr., Raymond P. Long, Linda Maraget, John Mascoll, Robert Mason Jr., Gloria Maxwell, Mary McCoy, Carol McFadden, Annie McKinney, Richard Merriman, James Moock, Michael Moore, David Morris, Thomas Neaman Jr., James L. Owens, William Passmore, Adolfo Paz, James M. Pennington, Mark Petersen, Andre Poulard, Trevor Daniel Putnam, Marcia Quinn, David Reed, Joe Reid, William B. Rich, Alexa Richardson, Terrance W. Ryan, Patti Jo Vitte Schmidt, Lorene Scott, Terrie Scott, Randy Seifert, John Serba, R.

PARTIES TO THE PROCEEDING IN THIS COURT – Continued

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The respondents in this proceeding are named in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING IN THIS COURT	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT	3
A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw	4
B. Proceedings Below	8
REASONS FOR GRANTING THE PETITION	13
I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth and Ninth Circuits' Interpretation, and Exacerbates an Existing Conflict in the Circuits	14
II. The Decision of the Court of Appeals Is Erroneous	16
III. The Question Presented Is Important	22
CONCLUSION	25
APPENDIX A	1a
APPENDIX B	19a
APPENDIX C	28a

TABLE OF AUTHORITIES

	Page
CASES	
Blackwell v. Cole Taylor Bank, 152 F.3d 666 (7th Cir. 1998)	14
Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984)	12
Criley v. Delta Air Lines, 119 F.3d 102 (2d Cir. 1997)	14
Connecticut v. Teal, 457 U.S. 440 (1982)	19
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995), *cert. denied*, 516 U.S. 916 (1995)	15
Edwards v. Shalala, 64 F.3d 601 (11th Cir. 1995)	12
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994)	18, 19
EEOC v. Governor Mifflin School District, 623 F. Supp. 734 (E.D. Pa. 1985)	7
EEOC v. McDonnell Douglas, 191 F.3d 948 (8th Cir. 1999)	14
EEOC v. Newport Mesa Unified School District, 893 F. Supp. 927 (C.D. Cal. 1995)	21
EEOC v. Wyoming, 460 U.S. 226 (1983)	5
Ellis v. United Airlines, 73 F.3d 999 (10th Cir. 1996), *cert. denied*, 517 U.S. 1245 (1996)	14, 18
Finnegan v. Trans World Airlines, 967 F.2d 1161 (7th Cir. 1992)	8
Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1247 (2001)	14

TABLE OF AUTHORITIES – Continued

Page

Geller v. Markham, 635 F.2d 1027 (2nd Cir. 1980) 6

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 7, 8, 14, 18, 20

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 4, 5, 13, 14, 19

Johnson v. Mayor and City of Baltimore, 472 U.S. 361 (1985) 5

Johnson v. Transportation Agency, 480 U.S. 616 (1987) 21

Jones v. Runyon, 32 F.3d 1454 (10th Cir. 1994) 12

Koger v. Reno, 98 F.3d 631 (D.C. Cir. 1996) 15

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983) 6

Lorillard v. Pons, 434 U.S. 575 (1978) 5, 6, 7

Lyon v. Ohio Education Association, 53 F.3d 135 (6th Cir. 1995) 15

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 5

Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) 18

Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) 14, 18

Pauley v. BethEnergy Mines, 501 U.S. 680 (1991) 12

United Independent Flight Officers v. United Air Lines, 572 F. Supp. 1494 (N.D. Ill. 1983) 6

TABLE OF AUTHORITIES – Continued

Page

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 8

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 19

STATUTES AND REGULATIONS

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1331 3

29 U.S.C. § 206(d)(1) 3, 10, 12

29 U.S.C. § 216(b) 9

29 U.S.C. § 623(a) 1, 5, 6

29 U.S.C. § 623(f)(1) 1, 6

29 U.S.C. § 626(c) 3

29 U.S.C. § 626(f) 2, 8

42 U.S.C. § 2000e-2(a)(2) 2, 17

42 U.S.C. § 2000e-2(k)(1)(A) 8

29 C.F.R. § 1625.7(d) 7, 12

MISCELLANEOUS

Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) 7

Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986) 7

TABLE OF AUTHORITIES – Continued

Page

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986) 7

Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984) 7

H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967) 5

U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965) 5

Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000) 16, 23

Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000) 16, 23

Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000) 16, 18, 22

Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982) 16

David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001) 16, 23

TABLE OF AUTHORITIES – Continued

Page

Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997) 16, 20, 23

Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995) 16

Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996) 16

Antonin Scalia, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29-37 (Amy Gutmann ed., 1997) 18

Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517 (1995) 17

Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996) 16

Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) 16

PETITION FOR A WRIT OF CERTIORARI

Wanda Adams, Leo L. Floyd and the other petitioners (collectively, the Adams Group) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The judgment of the court of appeals (App., *infra*, 1a-18a) is reported at 255 F.3d 1322. The opinions of the district court (App., *infra*, 19a-30a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 5, 2001 (App., *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 623(a) & (f)(1), provide:

> It shall be unlawful for an employer to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age; [or] to limit, segregate, or

> classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.
>
> * * *
>
> It shall not be unlawful for an employer * * * to take any action otherwise prohibited under [the preceding subsections] of this section where * * * the differentiation is based on reasonable factors other than age.

The relevant portion of the Older Workers Benefit Protection Act of 1990, 29 U.S.C. § 626(f), provides:

> An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum * * * if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer * * * informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to * * * (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

The relevant portion of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2), provides:

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees or applicants for employment in

> any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The relevant portion of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), provides:

> No employer * * * shall discriminate * * * between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to * * * a differential based on any other factor other than sex.

STATEMENT

The members of the Adams Group are 117 older former employees of the respondent Florida Power Corporation that the company fired during a corporate reorganization in which more than 70% of the employees who were fired were at least 40 years old. Invoking jurisdiction under 29 U.S.C. § 626(c) and 28 U.S.C. § 1331, members of the Adams Group sued Florida Power and its parent, Florida Progress Corporation, in the United States District Court for the Middle District of Florida and alleged that Florida Power had discriminated against them on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). The case was

conditionally certified as an opt-in class action under disparate impact and disparate treatment theories of liability, and the remaining members of the Adams Group joined the case.

Noting that the "circuits are remarkably divided on the issue" (App., *infra*, 24a), the district court subsequently decided that disparate impact claims could not be brought under the ADEA and decertified the class. Acknowledging that its decision conflicted with three circuits, but followed at least three other circuits, the court of appeals made a legal "pronouncement in the abstract" (App., *infra*, 2a n.1) that disparate impact liability was not available under the ADEA and affirmed.

A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw

This case asks whether the ADEA permits a disparate impact method of proving discrimination like the one employed in Title VII of the Civil Rights Act of 1964, permits no disparate impact method of proving discrimination under any circumstances, or permits *some* disparate impact method of proving discrimination—but under circumstances more limited than those available under Title VII. Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

In a 1965 report submitted to Congress two years before the enactment of the ADEA, the Secretary of Labor

stated that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965). Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong. 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995). Designed to combat "pervasive discrimination against the elderly," *Johnson v. Mayor and City of Baltimore*, 472 U.S. 361, 369 (1985), stemming from "inaccurate and stigmatizing stereotypes," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "the ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983).

The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify his employees in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. § 623(a)(2). As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584. A noted statutory difference between the ADEA and Title VII, however, is that an action "otherwise prohibited" by the ADEA is lawful "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). Title VII does not have this express exception.

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address, *inter alia*, arbitrary discrimination and systemic discrimination that could not be detected and proven in the same way that invidious discrimination is detected and proven, by permitting claims to proceed on the basis of disparate impact model of proof. As a court-imposed exception to disparate impact liability, the Court held that an employer defending an otherwise adequate disparate impact case could prevail if it established that its challenged practice was based upon a "business necessity."

Following *Griggs*, multiple courts applied the Title VII disparate impact model to ADEA cases: *See, e.g., Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir. 1980); *United Independent Flight Officers v. United Air Lines*, 572

F. Supp. 1494, 1505 (N.D. Ill. 1983). And, the relevant EEOC interpretive guidelines suggest that the "reasonable factors" defense in the ADEA works with the business necessity defense in the disparate impact analysis. The guidelines provide that an employer may raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d) (1999).

Congress amended the ADEA several times after *Griggs*. *See, e.g.*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984). Congress has never acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases.[1] *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D. Pa. 1985). To the contrary, the 1990 Congress amended the ADEA by adding the OWBPA and requiring that employers provide employees with *statistical information* regarding the ages of co-workers offered severance pay (and of those co-workers who were not let go) before employees could waive any potential age discrimination

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[1] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580.

claims. 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990).

In 1987, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation. Partially in response to *Ward's Cove*, Congress subsequently codified the *Griggs* Title VII disparate impact model into the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). Congress did not make any similar amendment to the ADEA. As late as 1992, however, Judge Posner recognized that "the weight of authority * * * is that disparate impact is a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161 (7th Cir. 1992).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

B. Proceedings Below

The Adams Group consists of 117 former employees of Florida Power who were at least 40 years old when the company fired them as part of an alleged reduction-in-force that began in 1992 and concluded in 1996. Over 70% of the personnel terminated were over the age of 40.

App., *infra*, 2a; Doc. 216-3; Doc. 67-4; Doc. 234-2.[2] Members of the Adams Group filed a complaint in the Middle District of Florida and alleged that Florida Power had violated the ADEA by (1) willfully discriminating against senior employees on the basis of their age, and (2) disparately impacting older employees, a result that could have been avoided by other means sufficient to satisfy Florida Power's business needs. App., *infra*, 2a-3a; Doc. 216-10-11.[3] The company and its parent denied any violation of the ADEA and asserted that Florida Power had legitimate, non-discriminatory reasons for firing the Adams Group. Doc. 218-11-16.

The district court conditionally certified a class in 1996, and potential class members were notified of their right to opt-in to the suit. App., *infra*, 3a; Doc. 84-1. The remaining members of the Adams Group then joined the case. Doc. 215-11 n.7. Two years later, the court decertified the class based upon its determination that (1) disparate impact analysis was not available under the ADEA, and (2) the class members could not be deemed similarly situated, as required under 29 U.S.C. § 216(b) for certification, unless their claims could be premised on a theory of disparate impact. App., *infra*, 3a. The district court judge certified the question of ADEA disparate

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[2] Given the procedural posture of the case, the allegations and evidence favoring the Adams Group are assumed true for purposes of this petition. *See* App., *infra*, 2a n.1, and *id.* at 3a-4a.

[3] Since these allegations are the same for each of the members of the Adams Group, reference is simply made to the first instance of ADEA allegations in the complaint (*i.e.*, Wanda Adams), as well as to the first instance of Florida Power's denial of those allegations.

impact to the Eleventh Circuit under 28 U.S.C. § 1292(b) because the question presented a controlling issue of law in the case and, since the circuits were "remarkably divided on the issue" (*id.* at 24a), he believed there were substantial grounds for disagreement over his decision (*id.* at 2a-3a).

The Eleventh Circuit accepted the case and, in an opinion joined by two members of the panel, affirmed. *Id.* at 8a. The court based its decision upon four grounds. First, the ADEA's exception for "reasonable factors other than age" does not exist in Title VII. *Id.* at 6a. Second, the court determined that this ADEA exception is similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. App., *infra*, 7a. Third, the court of appeals found that the legislative history of the ADEA is unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Ibid.* Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA.

In its conclusion, the court stated:

> The Second, Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not.[4] We find the reasoning of the Tenth Circuit * * * and the First Circuit * *'* persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

App., *infra*, 8a.

In a special concurrence, Judge Barkett disagreed with the panel's analysis and concluded that "disparate impact can be pled and proved in an appropriate case under the ADEA, and that it cannot be said as a matter of law that this theory can never be used in an age discrimination case."[5] She pointed to the similarities of the policies behind Title VII and the ADEA and argued that the ADEA's exception for "reasonable factors other than age" added nothing beyond what the Court had required in *Griggs* for Title VII plaintiffs, *i.e.*, that the challenged practice is neither "founded on 'business necessity,' [nor] lacks 'a manifest relationship to the employment.' " App., *infra*, 11a-12a (quoting *Griggs*, 401 U.S. at 431).

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[4] This is actually a misstatement. As discussed in the first reason for granting the petition, *infra*, the Third and Sixth Circuits have not held that that the disparate impact method of proving age discrimination is inapplicable to the ADEA.

[5] Judge Barkett would have affirmed based upon her determination that the Adams Group had not sufficiently alleged disparate impact and that the court of appeals was thus making a "pronouncement in the abstract." App., *infra*, 9a. Without reaching the sufficiency of the disparate impact allegations, the majority retorted that Judge Barkett's position was "inconsistent with the posture of the case. * * * Indeed, because the district court certified only the question of law to us, a 'pronouncement in the abstract' is required." *Id.* at 2a n.1.

Noting that the EEOC interpretive guidelines, 29 C.F.R. § 1625.7(d), are entitled to judicial deference,[6] the concurrence found that those guidelines suggest the ADEA's reasonable factors defense works in tandem with Title VII's business necessity defense. App., *infra*, 12a. Additionally, the concurrence observed that Congress had amended the ADEA several times after federal courts had held that disparate impact was available to ADEA plaintiffs, yet Congress had never sought to exclude disparate impact claims. *Id.* at 13a.

With respect to the asserted similarity between EPA's exception and the ADEA's exception, the concurrence made two distinctions: First, the question of disparate impact concerns the substantive provisions of the ADEA, which are similar to the substantive provisions of Title VII, not the remedial provisions of the EPA. *Id.* at 14a. Second, the EPA exception permits pay discrepancies for "any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), and thus requires only a neutral explanation for pay disparity to ensure that employers can only be liable for "intentional purposeful discrimination." App., *infra*, 14a. The ADEA exception requires, however, that the employer show the *reasonableness* of the neutral factor. *Id.* at 14a-15a.

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[6] App., *infra*, 12a n.4 (citing *Edwards v. Shalala*, 64 F.3d 601, 606 (11th Cir. 1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (10th Cir. 1994)); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696-98 (1991); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984)).

Finally, with respect to the Secretary of Labor's 1965 report preceding enactment of the ADEA, the concurrence acknowledged that the "report differentiated between what it termed 'arbitrary discrimination' based on age and problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees.' " *Id.* at 18a. Unlike the majority, however, the concurrence did not conclude that this differentiation precluded disparate impact claims. "The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination." *Ibid.*

REASONS FOR GRANTING THE PETITION

In *Hazen Paper*, the Court indicated that Title VII's disparate impact analysis *might* not be available to ADEA plaintiffs: "we have never decided whether a disparate impact theory of liability is available under the ADEA * * * and we need not do so here."[7] A clear division in the circuits ensued. As the Eleventh Circuit acknowledged (App., *infra*, 8a), its post-*Hazen* decision in this case conflicts with the post-*Hazen* decisions of the Second, Eighth and Ninth Circuits—and aligns the court with the First, Seventh and Tenth Circuits. Moreover, the decision below is erroneous, and the divisive federal question presented in this case is important.

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[7] 507 U.S. at 609-11.

I. The Court of Appeals' Interpretation of the ADEA Expressly Conflicts with the Second, Eighth and Ninth Circuits' Interpretation, and Exacerbates an Existing Conflict in the Circuits.

It is hard to conceive of a case presenting a clearer example of conflict in the circuits—a conflict the district court characterized as *remarkable* (App., *infra*, 24a). In short, the decisions of the Second, Eighth and Ninth Circuits conflict with the decisions of the First, Seventh and Tenth Circuits: ***Compare*** *Criley v. Delta Air Lines*, 119 F.3d 102, 105 (2d Cir. 1997) ("Although the Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, [*Hazen*, 507 U.S. at 610], in our circuit, we have recognized such an action."); *E.E.O.C. v. McDonnell Douglas*, 191 F.3d 948, 950 (8th Cir. 1999) ("While several of our sister circuits have held that the ADEA cannot support claims based on disparate impact * * * the law of this circuit is that disparate-impact claims are cognizable under the ADEA"); and *Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, ___ U.S. ___, 121 S.Ct. 1247 (2001) ("We have since [*Hazen Paper*] squarely decided that a disparate impact claim is cognizable in an ADEA case. * * * [W]e again hold that a disparate impact claim is cognizable under the ADEA"), ***with*** *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999), *cert. denied*, 528 U.S. 811 (1999) (the Title VII disparate impact model announced in "*Griggs* is inapposite in the ADEA context"); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998) ("disparate impact is not, at least in this circuit, a permissible theory of violation of the ADEA"); and *Ellis v. United Airlines*, 73 F.3d 999, 1006-07 (10th Cir. 1996),

cert. denied, 517 U.S. 1245 (1996) ("disparate impact claims are not cognizable under the ADEA"). Thus three circuits have expressly held that the disparate impact method of proving age discrimination is available in ADEA cases, and four circuits have expressly held that the disparate impact method is not available in ADEA cases.

As for the remaining circuits, the Court of Appeals for the District of Columbia has so far assumed without deciding that disparate impact is available under the ADEA. *Koger v. Reno*, 98 F.3d 631, 639 (D.C. Cir. 1996). Judge Greenberg of the Third Circuit opined in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995) (opinion of Greenberg, J.), *cert. denied*, 516 U.S. 916 (1995), that "it is doubtful that *traditional* disparate impact theory is a viable theory of liability under the ADEA") (emphasis added). The Sixth Circuit suggested in *Lyon v. Ohio Education Association*, 53 F.3d 135, 139 n.5 (6th Cir. 1995), that disparate impact claims under the ADEA may no longer be viable in that court: "There is considerable doubt as to whether a claim of age discrimination may exist under a disparate-impact theory * * * . However, this circuit has stated that a disparate-impact theory of age discrimination may be possible." The Fourth and Fifth Circuits have not addressed the issue.

To resolve whether disparate impact is an available method of proving age discrimination under the ADEA, the Court should grant certiorari.

II. The Decision of the Court of Appeals is Erroneous

A number of different scholars and jurists have articulated why disparate impact should be available under the ADEA, and under what circumstances.[8] Some favor importation of traditional Title VII disparate impact analysis. Others favor models that apply disparate impact analysis, but allow the employer a defense if the challenged practice is based upon *reasonable factors*—giving that statute-based phrase less weight than the "business

[8] *See, e.g.*, Brett Ira Johnson, Note, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 (2000); Jennifer J. Clemons and Richard A. Bales, Article, *ADEA Disparate Impact in The Sixth Circuit*, 27 OHIO N.U. L. REV. 1 (2000); Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. CIN. L. REV. 299 (2000); Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997); Jonas Saunders, Note, *Age Discrimination: Disparate Impact Under the ADEA after Hazen Paper Co. v. Biggins: Arguments in Favor*, 73 U. DET. MERCY L. REV. 591 (1996); Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984); *cf.* David E. Mitchell, Comment, *Recent Cases Affecting The Role of The ADEA in Protecting Older Workers*, 39 DUQ. L. REV. 437 (2001). *But see* Brendan Sweeney, Comment, *Downsizing the Age Discrimination in Employment Act: The Availability of Disparate Impact Liability*, 41 VILL. L. REV. 1527 (1996); Evan H. Pontz, Comment, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. REV. 267 (1995); Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837 (1982).

necessity" required for a Title VII disparate impact claim. And, for some, the disparate impact model is simply a method of detecting and proving the otherwise unprovable—subtle biases and concealed intent.

The petitioners agree with substantive analysis of the concurrence in the court of appeals discussed above and believe that disparate impact should be available under the ADEA as it is under Title VII. The following brief arguments further demonstrate that the court of appeals erred, and that this Court should answer the question presented without extinguishing disparate impact analysis from ADEA litigation.

A. The plain language of the ADEA in light of *Griggs* supports disparate impact. Under the ADEA, an employer may not "limit, segregate, or classify his employees in any way which would . . . adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). The ADEA does not use the word "discriminate," but instead "imposes liability for employment practices that 'adversely' affect an employee's 'status', and nowhere includes an intent requirement." Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517. Since *Griggs* holds that identical language under Title VII, 42 U.S.C. § 2000e-2(a), supports recognizing disparate impact claims, the language supports disparate impact claims under the ADEA as well. By prohibiting practices that "adversely affect" older employees, the ADEA prohibits decisions having an "adverse impact" on older employees.

B. The significance of the Secretary of Labor's 1965 report preceding the 1967 enactment of the ADEA has been overblown. *Mullin* and *Ellis*[9] relied upon the report's concern with "arbitrary discrimination" as proof that Congress enacted the ADEA to bar only intentional discrimination. *Mullin*, 164 F.3d at 703; *Ellis*, 73 F.3d at 1008. The Secretary's report *does* provide some insight into the origins of the ADEA, but does not eliminate the possibility that disparate impact may be actionable—especially given that the report was issued seven years before *Griggs*. *See Griggs*, 401 U.S. at 431 (purpose of disparate impact is to deal with arbitrary discrimination); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1215 (7th Cir. 1987) (Easterbrook, J., dissenting) (same); *see also Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. at 337-38 (arbitrary does not mean intentional). To the limited extent that the report suggests anything about disparate impact, it is hardly binding. *See generally*, Antonin Scalia, COMMON-LAW COURTS IN A CIVIL-LAW SYSTEM: THE ROLE OF THE UNITED STATES FEDERAL COURTS IN INTERPRETING THE CONSTITUTION AND LAWS, IN A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 29-37 (Amy Gutmann ed., 1997).

C. Disparate impact is just a proxy for conventional proof of intentional discrimination. *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1078-80 (7th Cir. 1994)

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[9] In reaching its conclusion, the court of appeals in this case primarily followed *Mullin* and *Ellis*. App., *infra*, 6a-8a.

(Cudahy, J., dissenting). As Judge Cudahy stated in *Francis W. Parker School*:

> [T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw.

41 F.3d at 1080-81 (quoting *Hazen Paper*, 507 U.S. at 604). This view of the proper role of disparate impact was previously suggested in a dissent joined by Chief Justice Rehnquist and Justice O'Connor in *Connecticut v. Teal*, 457 U.S. 440 (1982):

> In disparate-impact cases, by contrast, the plaintiff seeks to carry his burden of proof [of discriminatory intent] by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs.

457 U.S. at 458-59 (Powell, J., dissenting); *see also Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988) ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination").

If disparate impact is viewed in this way, a plaintiff terminated by a seemingly innocent underling might be able to prevail by showing both strong statistical evidence of disparate impact on a company-wide basis, and (for example) evidence that the company's chief executive officer sought to eliminate older workers *because of*

their age. While a direct connection between the decision maker and the executive might be tenuous in a disparate treatment case, adequate evidence under a disparate impact model could allow the employee to show that the corporate culture had been pervaded by ageism—the sort of subtle systemic bias that *Griggs* sought to eliminate.

D. The ADEA "reasonable factors other than age" exception authorizes employment practices that would be "otherwise prohibited;" thus, the substantive prohibitions of the ADEA *must* bar actions that do not constitute disparate treatment. As Dean Player has explained:

> If age motivated the employer's action, [the prohibition] establishes prima facie liability. Now turning to [the reasonable factors exception]; it allows the action if the factor used is "reasonable" and "other than age." There is no way [the exception] could ever have an application if [the prohibitions of the ADEA are] limited to motivated decision making. If [the prohibition does] not extend beyond age motivation, there would be no need to have [the exception] because age motivated decisions could not possibly be for reasons other than age. The only way for [the exception] to have structural validity is to recognize that [the prohibition] can be violated by non-age or age-neutral factors. At this point, [the exception] would allow the employer to establish the defense that the challenged device was both neutral in terms of intent and was "reasonable."

Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act, 31 U. RICH. L. REV.

819. Under this analysis, every word in the ADEA provisions at issue is given effect—including the word *reasonable*.

E. Although Title VII does not have an identical "reasonable factors" clause, it does recognize the business necessity defense. Title VII and the ADEA have different provisions because "Congress intended employers to have more leeway in considering factors that disparately affect older workers under the ADEA than factors that disparately affect classes protected under Title VII." *EEOC v. Newport Mesa Unified School District*, 893 F. Supp. 927, 932 (C.D. Cal. 1995). Thus, although the burden of demonstrating "reasonableness" may be lower in ADEA disparate impact claims, the primary test is the same: Does the practice disparately impact protected individuals?

F. *If* Congress's failure to act after courts repeatedly approved ADEA disparate claims does *not* mean that Congress approved such claims because "vindication by congressional inaction is a canard,"[10] then little should be read into the fact that Congress codified disparate impact after *Wards Cove* in its 1991 amendments to Title VII without doing so for the ADEA. If vindication by congressional inaction is not a fiction, however, there is a potential argument that ADEA plaintiffs remain in the position that Title VII plaintiffs were in between *Wards Cove* (in 1987) and 1991. If so, ADEA plaintiffs may use

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[10] *Johnson v. Transportation Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting).

the disparate impact method of proving age discrimination, but the employer has only to show that the challenged action significantly served a legitimate business objective, and the plaintiff has at all times the burden of persuasion. *Wards Cove*, 490 U.S. at 659.

III. The Question Presented is Important

There is a plethora of scholarly opinions regarding whether and when disparate impact analysis is applicable to the ADEA.[11] A number of post-*Hazen* writers agree on *one* topic, however: The Court should resolve the issue. As a recent writer observed:

> Since *Hazen*, several courts of appeal have reconsidered the validity of a disparate impact claim under the ADEA. Some have reversed prior rulings, which had allowed for ADEA disparate impact claims, while others have refused to do so without a clear directive from the Supreme Court. The Supreme Court has denied petitions for a writ of certiorari on the issue several times, leaving lower courts to speculate regarding the appropriateness of disparate impact under the ADEA.

Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability, 36 IDAHO L. REV. 316-17. Another commentator, favoring a *non*-Title VII type of disparate impact analysis for ADEA cases, said:

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[11] *See, e.g., supra*, n.8.

> The lower courts have split on the issue. Unless clarification is brought to this area of the law, ADEA plaintiffs seeking to challenge an age-neutral employment practice adversely affecting older workers will have different results based merely upon the federal circuit in which their suit is brought.

The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?, 69 U. CIN. L. REV. at 300 (footnotes omitted). Another commentator urged:

> The intercircuit split on the issue of whether disparate impact claims should be recognized under the ADEA is a significant one. Its resolution has the potential to increase or reduce the number of successful ADEA claims. The ability to use a disparate impact theory as a basis for ADEA claims is important to plaintiffs who have difficulty obtaining direct or even circumstantial evidence of age discrimination.

Recent Cases Affecting The Role of The ADEA in Protecting Older Workers, 39 DUQ. L. REV. 437. And still others have put it this way:

> Faced with no clear guidance from the Supreme Court and the mix of opinions of the various appellate courts, lower courts and legal commentators continue to struggle with the issue.
>
> * * *
>
> [T]he authors believe that it is important that the Supreme Court provide immediate guidance to the lower courts regarding the viability of the disparate impact theory under the ADEA.

ADEA Disparate Impact in The Sixth Circuit, 27 OHIO N.U. L. REV. at 2, 18; *see also Wards Cove Packing or Not Wards*

Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act, 31 U. RICH. L. REV. 819 ("the new division between circuits makes the issue ripe for Supreme Court resolution").

While there may be, as the *Hazen* concurrence stated, "substantial *arguments* that it is improper to carry over disparate impact analysis from Title VII to the ADEA,"[12] the issue is far from a dead letter, and the proposed arguments do not resolve whether *some* form of disparate impact is available to ADEA plaintiffs as a means of proving age discrimination. The time has come for the Court to resolve whether disparate impact analysis is appropriate in ADEA litigation and, if so, under what conditions.

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[12] *Hazen*, 507 U.S. at 617 (Kennedy, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2001

APPENDIX A

United States Court of Appeals
Eleventh Circuit.

Wanda L. ADAMS, Leo L. Floyd, et al., Plaintiffs, Counter-defendants,
Appellants,
v.
FLORIDA POWER CORP., Florida Progress Corporation, Defendants, Counter-claimants, Appellees.

No. 99-15306.

July 5, 2001.

Stuart C. Markman, Kynes, Markman & Felman, P.A., Scott Charlton, Clark, Charlton, Martino & Borders, P.A., Tampa, FL, Edward L. Scott, Scott & Gleason, P.A., Ocala, FL, Michael Steven Finch, Saint Petersburg, FL, for Appellants.

Robert E. Gaddy, Florida Power Corp., St. Petersburg, FL, J. Lewis Sapp, Nancy F. Reynolds, Elarbee, Thompson & Trapnell, Atlanta, GA, Alison B. Marshall, Glen D. Nager, Jones, Day, Reavis & Pogue, Washington, DC, for Appellees.

Appeal from the United States District Court for the Middle District of Florida.

Before BIRCH, BARKETT and MAGILL,* Circuit Judges.

BIRCH, Circuit Judge:

This case presents an issue of first impression in our circuit regarding whether a disparate impact theory of

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* Honorable Frank J. Magill, U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

liability is available to plaintiffs suing for age discrimination under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.* The district court ruled as a matter of law that disparate impact claims cannot be brought under the ADEA. Because the question presents a controlling issue of law in the case, and the judge opined that there were substantial grounds for disagreement over his decision, he certified the question to us pursuant to 28 U.S.C. § 1292(b).[1] We exercise our discretion to take the case and AFFIRM.

I. BACKGROUND

Florida Power Corporation ("FPC") operated as a publicly-regulated electric utility monopoly until 1992, when Congress opened the industry to competition through the Energy Policy Act of 1992, 106 Stat. 2776 (1992). Florida Progress Corporation is its parent corporation. Wanda Adams and several other plaintiffs (the "Adams class") were terminated by FPC between 1992 and 1996, during a series of reorganizations the company states were necessary to maintain its competitiveness in the newly deregulated market. Members of the Adams

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[1] Our sister, in her concurring opinion, concludes that we overreach by deciding the question of whether disparate impact claims are cognizable under ADEA as a matter of law. She would find that the plaintiffs failed to adequately allege a disparate impact claim. This position is inconsistent with the posture of the case. The district court expressly made no findings of fact on the sufficiency of the allegations in the plaintiffs' complaint. Indeed, because the district court certified only the question of law to us, a "pronouncement in the abstract" is required.

class sued FPC and its parent corporation claiming, *inter alia*, that FPC discriminated against them because of their age, in violation of the ADEA.

In 1996, the district court conditionally certified a class of former FPC employees claiming age discrimination. In August 1999, the district court decertified the class and ruled as a matter of law that a disparate impact theory of liability is not available to plaintiffs bringing suit under the ADEA.[2] Because there is some conflict among the circuits and we had not yet ruled on the availability of disparate impact claims under the ADEA, the district court certified the question to us pursuant to 28 U.S.C. § 1292(b).[3] The court was careful to note that he made no findings of fact or assessment of whether the Adams class could produce evidence sufficient to state a claim for disparate impact. Accordingly, the sole question

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[2] The court also found that the plaintiffs' disparate treatment claims were not sufficiently similar to support proceeding as a class. Accordingly, the court held that the Adams class members would each have to pursue their individual remedies separately.

[3] The district court's Order of Certification states the following:

> [W]hether I am right or wrong in ruling that the disparate impact theory of liability is unavailable to these Plaintiffs is a critical issue that ought to be resolved with finality before the Court can reasonably proceed with the management of this litigation toward trial. . . . The controlling question of law is whether the "disparate impact" theory or method of proving liability is applicable to claims brought under the [ADEA].

R3-312, at 2-3 (internal citations omitted).

before us is whether, as a matter of law, disparate impact claims may be brought under the ADEA.

II. DISCUSSION

We review the district court's interpretation of a statute *de novo*. *United States v. Prosperi*, 201 F.3d 1335, 1342 (11th Cir.2000). As with any question of statutory interpretation, we begin by examining the text to determine whether its meaning is clear. "In construing a statute we must begin, and often should end as well, with the language of the statute itself." *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir.1997). "Where the language Congress chose to express its intent is clear and unambiguous, that is as far as we go to ascertain its intent because we must presume that Congress said what it meant and meant what it said." *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc), *cert. denied*, 528 U.S. 933, 120 S.Ct. 335, 145 L.Ed.2d 261 (1999).

The language of the ADEA closely parallels that of Title VII. *See Lorillard v. Pons*, 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978) (noting that "the prohibitions of the ADEA were derived *in haec verba* from Title VII.") In fact, the sections forbidding discrimination are almost identical. *Compare* 29 U.S.C. § 623(a)(1) (ADEA) *with* 42 U.S.C. § 2000e-2(a)(1) (Title VII). The Supreme Court has held that Title VII supports a cause of action for employment discrimination based on a disparate impact theory.[4] *See Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971).

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[4] A disparate impact claim is one that "involve[s] employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609, 113 S.Ct. 1701, 1705, 123 L.Ed.2d 338 (1993) (quoting *Teamsters v. United States*, 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1855 n. 15, 52 L.Ed.2d 396 (1977)).

Several circuits have relied on the holding in *Griggs* to find that, because the language of the ADEA parallels Title VII, disparate impact claims also should be allowed under the ADEA. *See Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir.1980); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir.1996); *E.E.O.C. v. Borden's, Inc.*, 724 F.2d 1390, 1394-95 (9th Cir.1984). In a case involving liquidated damages under the ADEA, the Supreme Court explicitly left open the question of "whether a disparate impact theory of liability is available under the ADEA." *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706, 123 L.Ed.2d 338 (1993). The Second, Eighth, and Ninth Circuits have read *Hazen* literally and continue to allow disparate impact claims. *See Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir.1997) (per curiam); *Lewis v. Aerospace Cmty. Credit Union*, 114 F.3d 745, 750 (8th Cir.1997); *Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir.2000); *E.E.O.C. v. Local 350*, 998 F.2d 641, 648 n. 2 (9th Cir.1993).

In contrast, the First, Third, Sixth, Seventh, and Tenth Circuits have questioned the viability of disparate impact claims under the ADEA post-*Hazen*.[5] *See Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir.), *cert. denied*, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *E.E.O.C.*

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[5] The Fourth, Fifth, and D.C. Circuits have not addressed this issue.

v. Francis W. Parker School, 41 F.3d 1073, 1076-77 (7th Cir.1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir.1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.1995); *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir.1995). These cases rely on language in *Hazen* and other factors that suggest that disparate impact claims are not viable under the ADEA.

First, courts that question the viability of a disparate impact claim under the ADEA note that the text of the ADEA differs from Title VII in an important respect. Section 623(f)(1) of the ADEA explicitly provides that an employer may "take any action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). The First Circuit has reasoned that

> if the exception contained in section 623(f)(1) is not understood to preclude disparate impact liability, it becomes nothing more than a bromide to the effect that "only age discrimination is age discrimination." Such a circular construction would fly in the teeth of the well-settled canon [of statutory construction].

Mullin, 164 F.3d at 702.

In addition, the language of § 623(f)(1) is similar to language found in the Equal Pay Act. Section 206(d)(1) of the Equal Pay Act provides that wage discrimination on the basis of gender is prohibited, unless the wage "differential [is] based on any other factor other than sex." 29 U.S.C. § 206(d)(1)(iv). "The Supreme Court [has] interpreted section 206(d)(1) of the Equal Pay Act to preclude disparate impact claims." *Ellis*, 73 F.3d at 1008 (citing

County of Washington, Ore. v. Gunther, 452 U.S. 161, 170-71, 101 S.Ct. 2242, 2248-49, 68 L.Ed.2d 751 (1981)); *Mullin*, 164 F.3d at 702 (drawing same comparison).[6] The text of the ADEA is sufficiently distinguishable from Title VII as to raise doubts about extending the disparate impact theory of liability to ADEA cases.

Turning to the legislative history, the *Mullin* and *Ellis* courts note that the ADEA was enacted after the Secretary of Labor issued a report on age discrimination. *Mullin*, 164 F.3d at 702-03; *Ellis*, 73 F.3d at 1008. The report, entitled *The Older American Worker: Age Discrimination in Employment* (1965), recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways. *Ellis*, 73 F.3d at 1008. Thus, the history of the ADEA differs from the legislative history of Title VII, which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact. *See Griggs*, 401 U.S. at 432, 91 S.Ct. at 854 (discussing the history of amendments to the bill and noting that for Title VII, Congress specifically "placed on

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[6] We note that the ADEA requires that the "other factor" be a reasonable one, while the Equal Pay Act finds "any other factor" acceptable. *Compare* 29 U.S.C. § 623(f)(1) *with* 29 U.S.C. § 206(d)(1)(iv). It could be argued that this difference distinguishes the ADEA from the Equal Pay Act, and supports the inference that the reasonableness requirement refers to the business necessity justification that, in Title VII cases, can be used to defend an employment qualification that has a disparate impact on employees in the protected class. In light of the differences between the ADEA and Title VII discussed herein, we decline to draw such an inference.

the employer the burden of showing that any given requirement must have a manifest relationship to the employment in question.").

Finally, while the *Hazen* Court left open the question of whether a disparate impact claim can be brought under the ADEA, language in the opinion suggests that it cannot. First, the Court noted that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610, 113 S.Ct. at 1706. In addition, the Court reiterated that, in making employment decisions, the use of factors correlated with age, such as pension status, did not rely on "inaccurate and stigmatizing stereotypes" and was acceptable. *Id.* at 611, 113 S.Ct. at 1706-07. That position is inconsistent with the viability of a disparate impact theory of liability, which requires no demonstration of intent, but relies instead on the very correlation between the factor used and the age of those employees harmed by the employment decision to prove liability.

III. CONCLUSION

The Second, Eighth, and Ninth Circuits allow disparate impact claims under the ADEA. The First, Third, Sixth, Seventh, and Tenth do not. We find the reasoning of the Tenth Circuit in *Ellis* and the First Circuit in *Mullin* persuasive. Accordingly, we find that disparate impact claims may not be brought under the ADEA, and AFFIRM.

BARKETT, Circuit Judge, specially concurring:

I would affirm the district court's ruling in this case, but for reasons other than the one relied upon by the district court.[1] I do not believe the complaint here pleads a disparate impact claim sufficient to qualify for class certification. Thus, because I find that plaintiffs have sufficiently alleged only that they suffered disparate treatment, and the district court's denial of certification on the disparate treatment claim is not at issue on this appeal, I believe it is unnecessary and premature to address the question of whether disparate impact claims are cognizable under the ADEA. I think it especially unwise because this question does not lend itself to a pronouncement in the abstract.

The decision as to whether a disparate impact claim is available in an age discrimination case should be made on a case specific basis rather than on an overreliance on decontextualized language from the Supreme Court's decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S.Ct. 1701, 123 L.Ed.2d 338 (1993). The purposes of the ADEA, the Supreme Court's treatment of the issue in *Hazen Paper*, and consideration of the various views of our sister courts, lead me to conclude that disparate impact can be pled and proved in an appropriate case

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[1] We may affirm the district court's decision for reasons different than those stated by the district court. *See* Sec. & Exch. Comm'n v. Chenery Corp., 318 U.S. 80, 88, 63 S.Ct. 454, 87 L.Ed. 626 (1943) (stating that the decision of the lower court must be affirmed if the result is correct even though the lower court relied upon a wrong ground or gave a wrong reason); *see also Turlington v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1434 (11th Cir.1998).

under the ADEA, and that it cannot be said as a matter of law that this theory of recovery can never be used in an age discrimination case.

First of all, the purpose of the ADEA, like the purpose of Title VII and the ADA, is to eradicate employment discrimination based on the stigmatizing stereotypes of age, race, gender or disability. Disparate impact claims provide an avenue for members of protected classes to prove that discrimination occurred in the workplace when proof of motive is difficult or unavailable. Beginning with *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), the Supreme Court recognized that although discriminatory intent could be hidden, even from the decisionmaker himself, its effects in the workplace could not. Thus, Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id.* at 431, 91 S.Ct. 849. Accordingly, the Supreme Court interpreted Title VII to permit a member of a protected group to challenge facially neutral employment practices that perpetuate inequality by disproportionately burdening a protected class.

However, pleading a disparate impact case only gets you into the courthouse. An employer in every statutory context can defend a disparate impact case by citing a legitimate business necessity for the neutral policy at issue.[2] Thus, in those cases where it can be shown that

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[2] Title VII requires an employer to demonstrate that the challenged practice is a job related business necessity. 42 U.S.C. § 2000e-2(k)(1)(A)(i). The ADA defines discrimination as including the use of "selection criteria that screen out or tend to

the decision causing the disparate impact was based on business necessity, the claim will be defeated.[3] Disparate impact is not an easy theory to plead and prove in any context. I believe that it is probably a more difficult claim to make under the ADEA than in a race or gender context because the impact of neutral policies which fall disproportionately on class members protected by the ADEA can be proven to be related to legitimate business reasons in more instances than those which might impact other protected groups. *See Hazen Paper*, 507 U.S. at 610-11, 113 S.Ct. 1701.

The majority, however, concludes that disparate impact claims are simply not viable because Section 623(f)(1) of the ADEA *specifically* exempts a decision based on factors other than age, notwithstanding its similarity to Title VII. 29 U.S.C. § 623(f)(1). But, as noted, in every statutory discrimination case, a decision based upon legitimate business necessity will never support a

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screen out an individual with a disability or a class of individuals with disabilities" unless such criteria are "shown to be job-related for the position in question and [are] consistent with business necessity." 42 U.S.C. § 12112(b)(6).

[3] *See, e.g., Belk v. Southwestern Bell Telephone Co.*, 194 F.3d 946, 951 (8th Cir.1999) (employer in ADA suit could raise business necessity defense to plaintiff's claim that employer's physical performance test has a disparate impact); *Davis v. City of Dallas*, 777 F.2d 205, 208 (5th Cir.1985) (finding that city's requirement that applicants for police officer must have completed 45 semester hours of college credit with at least C average at accredited college or university, must not have history of recent or excessive marijuana use, and must not have been convicted of more than three hazardous traffic violations in preceding 12 months, were job related).

claim for liability. *Griggs* itself recognized and repeatedly emphasized that disparate impact is a basis for relief only if the practice in question is not founded on "business necessity," or lacks "a manifest relationship to the employment." *Id.* at 431, 91 S.Ct. 849. Section 623(f)(1) of the ADEA adds nothing new. Therefore, Section 623(f)(1) of the ADEA should not be interpreted as anything more than a statutory description of the business necessity defense.

In fact, the EEOC interpretive guidelines, which are entitled to judicial deference,[4] suggest that the "reasonable factors" defense in the ADEA works in tandem with the business necessity defense in the disparate impact analysis. These guidelines indicate that an employer may raise a "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." *See* 29 C.F.R. § 1625.7(d) (1999).[5] In light of the parallels between the

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[4] *Edwards v. Shalala*, 64 F.3d 601, 606 (11th Cir.1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (10th Cir.1994)); *see also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696-98, 111 S.Ct. 2524, 115 L.Ed.2d 604 (1991); *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 866, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

[5] EEOC guidelines interpret the "reasonable factor other than age" defense as limited only to factors justifiable as a "business necessity":

> (d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.
>
> (e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.
>
> (f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plants which qualify for the section 4(f)(2) exception to the Act.

29 C.F.R. § 1625.7 (2000).

substantive provisions of the ADEA and Title VII, and in light of the fact that Congress has amended the ADEA several times but has never explicitly excluded disparate impact claims,[6] a reasonable interpretation of Section

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[6] After the *Griggs* decision, several courts extended disparate impact analysis to the ADEA. *See, e.g., Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir.1983); *Geller v. Markham*, 635 F.2d 1027 (2nd Cir.1980); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 572 F.Supp. 1494, 1505 (N.D.Ill.1983). Congress has amended the ADEA several times since *Griggs*. *See e.g.*, Age Discrimination in Employment Amendments of 1986, Pub.L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub.L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub.L. No. 98-459, § 802, 98 Stat. 1792 (1984). None of the amendments have limited or prohibited disparate impact analysis. *See also EEOC v. Governor Mifflin Sch. Dist.*, 623 F.Supp. 734, 740-41 (E.D.Pa.1985) (analyzing amendments to the ADEA and finding no prohibition against disparate impact claims).

623(f)(1) is that it codifies the business necessity exception to disparate impact claims.

I am unpersuaded by the majority's conclusion that the the [sic] Supreme Court's determination that a similar provision in the Equal Pay Act ("EPA") precludes disparate impact claims. *See County of Washington, Ore. v. Gunther*, 452 U.S. 161, 170-71, 101 S.Ct. 2242, 68 L.Ed.2d 751 (1981). There are several problems with analogizing from the EPA to the ADEA. First, this case concerns the substantive provisions of the ADEA, which have been recognized to share common substantive provisions as Title VII, and not the remedial provisions of the ADEA which are similar to the remedial provisions of the EPA. *Wallace v. Dunn Construction Co.*, 62 F.3d 374, 378 (11th Cir.1995). Second, Section 206(d)(1) of the EPA permits discrepancies in wages paid to male and female workers for "any other factors other than sex." 29 U.S.C. § 206(d)(1)(iv). The EPA thus merely requires the employer to provide a neutral explanation for any disparity in pay. The EPA's broad defense for employers ensures that the Act targets only intentional purposeful discrimination.[7] In contrast,

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"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978).

[7] *See Gunther*, 452 U.S. at 170, 101 S.Ct. 2242 (noting that in comparison to Title VII, which permits disparate impact claims, the Equal Pay Act "was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. . . . Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a

under section 623(f)(1) of the ADEA, the employer must demonstrate the *reasonableness* of the neutral factor. The ADEA's narrow limitation of liability ensures that the Act reaches all arbitrary age discrimination.

Furthermore, I disagree with the majority's interpretation of *Hazen Paper* as precluding disparate impact claims under the ADEA. The Court in *Hazen Paper* took great care to say explicitly that that decision should not be read to address a disparate impact case: "[W]e have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Hazen Paper*, 507 U.S. at 610, 113 S.Ct. 1701. In *Hazen Paper*, the neutral policy at issue was the termination of an employee who was close to vesting under his pension plan. As the Court recognized, the policy could have affected "older" and "younger" workers alike. The crucial fact underlying the Supreme Court's decision in *Hazen Paper* was that Hazen Paper decided to fire the plaintiff on the basis of his pension status which, under the company's policy, was based on years of service, not age. The Court explained that "an employee's age is analytically distinct from his years of service." *Id.* at 611, 113 S.Ct. 1701.

> An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, *see* 29 U.S.C. § 631(a),

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bona fide use of 'other factors other than sex.' "); *Varner v. Illinois State University*, 226 F.3d 927, 934 (7th Cir.2000) ("By providing a broad exemption from liability under the Equal Pay Act for any employer who can provide a neutral explanation for a disparity in pay, Congress has effectively targeted employers who intentionally discriminate against women.").

> may have worked for a particular employer his entire career, while an older worker may have been newly hired. Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."

Id. Accordingly, the claimant could not prevail when he was fired on this basis, even though he was 62 years old. The Court held that the motivation to avoid the vesting of pension benefits was insufficient to state a disparate treatment claim under the ADEA because the evidence did not show that Hazen Paper's decision was based on the plaintiff's age. *Id.* ("When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is."). However, the Court also made clear that:

> We do not preclude the possibility that an employer who targets employees with a particular pension status on the assumption that these employees are likely to be older thereby engages in age discrimination. Pension status may be a proxy for age, not in the sense that the ADEA makes the two factors equivalent, but in the sense that the employer may suppose a correlation between the two factors and act accordingly.

Id. at 612-13, 113 S.Ct. 1701 (citation omitted). Thus, the Court did not rule out the possibility that an employer's purported reliance on an age-proxy could reflect the type of "inaccurate and denigrating generalization about age"

that the ADEA was designed to prohibit. *Id.* at 612, 113 S.Ct. 1701. For example, there is nothing in *Hazen Paper* that addresses a disparate impact challenge to an employer's insurance policy which might provide coverage for health problems affecting young employees, but exclude coverage for health problems affecting older employees (for example, a policy which covered braces but not dentures, or a policy generally covering progressive, neurodegenerative diseases except for Alzheimer's disease). *See also Arnett v. California Public Employees Retirement System*, 179 F.3d 690 (9th Cir.1999), *vacated and remanded on other grounds*, 528 U.S. 1111, 120 S.Ct. 930, 145 L.Ed.2d 807 (2000) (plaintiffs' claim that employer's disability benefits program which discriminated on the basis of potential years of service, rather than actual years of service, adversely affected older workers stated a valid claim of disparate impact under the ADEA). Furthermore, the Court explicitly stated that it did not consider a situation in which the employee's pension status is based on *age*, rather than years of service:

> [W]e do not consider the special case where an employee is about to vest in pension benefits as a result of his age, rather than years of service and the employer fires the employee in order to prevent vesting.

Hazen Paper, 507 U.S. at 613 (citation omitted).

Finally, the majority is of the view that the legislative history of the ADEA suggests it was not enacted to address disparate impact claims, citing the report commissioned from the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* (1965). The report recommended that Congress prohibit "arbitrary

discrimination," but that factors which "affect older workers" be addressed through programmatic measures to improve opportunities for older workers. *Id.* at 21-25. That report differentiated between what it termed "arbitrary discrimination" based on age and problems resulting from factors that "affect older workers more strongly, as a group, than they do younger employees." *Id.* at 5, 11. The majority concludes that this precludes disparate impact claims because these are claims that only address "factors that affect older workers more strongly," not arbitrary discrimination. But this begs the question. The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination. Claimants should have the opportunity to prove it when it is the latter.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al.,

Plaintiffs,

-vs-

FLORIDA POWER CORPORATION, et al.,

Defendants.
_____/

Case No.
95-123 CIV-OC-10A

ORDER ON PENDING MOTIONS

(Filed Aug. 26, 1999)

On June 22, 1998 (Doc. 215) I entered a comprehensive order disposing of all pending motions in this case and in the related case of *Akin v. Florida Power Corporation, et al.*, Case No. 97-173 Civ-OC. That Order should be read in conjunction with this one for the purpose of gaining an understanding of the history of the action.

There are three motions now before the Court. They are, in reverse order, a motion by the Plaintiffs to enforce settlement (Doc. 263); a motion by the Defendants for summary judgment (Doc. 238); and a motion by the Defendants to decertify the Plaintiff class (Doc. 221).

Plaintiff's Motion To Enforce Settlement (Doc. 263)

The Plaintiffs claim that they entered into an oral meeting of the minds with the Defendants – an offer and

acceptance – resulting in a settlement agreement that the Defendants have repudiated and refuse to perform. The Plaintiffs therefore move (Doc. 263) for an order enforcing the agreement. The Defendants respond that no such agreement was made; that essential terms of the alleged agreement remained unresolved, including the requirement of a written settlement agreement; and that the governing statute, OWBPA, 29 USC § 626(f)(1)(A) and (2), expressly requires a written agreement settling the ADEA claims.

In the common vernacular, there appears to be a swearing contest between the lawyers, one that the Court would doubtless find difficult if not impossible to decide on the merits of the claim if a full blown evidentiary hearing should be conducted. It is for that very reason that the rules of the Court, quite apart from the governing statute, expressly require that all agreements between the parties must be "reduced to writing and subscribed by the party or attorney against whom it is asserted." Rule 4.15, M. D. Fla. Rules. And, as Defendants point out, the OWBPA contains the same requirement relating to ADEA claims. It follows that the motion to enforce settlement (Doc. 263) must be, and is, DENIED.

Defendants' Motion For Summary Judgment (Doc. 238)

In the Order of June 22, 1998 (Doc. 215) the Court ruled with regard to certain identified Plaintiffs that their claims under the Florida Civil Rights Act (the FCRA) were precluded as a matter of law by releases entered into by those Plaintiffs in exchange for certain payments made by the Defendants, the OWBPA being inapplicable

to those state law claims. The Court also ruled that the ERISA claims of all Plaintiffs should be dismissed, with leave to amend, for failure to allege exhaustion of administrative remedies before filing suit (see Doc. 215 at pages 17-18). However, no such amendment was ever filed.

Treating those rulings as establishing the law of the case, the Defendants' present motion for summary judgment seeks to apply those rulings to the Plaintiffs who have joined or have opted into the action since June 22, 1998, the date of the filing of the Plaintiffs' Sixth Amended Complaint (Doc. 216). Without conceding the motion itself, the Plaintiffs do not contest that the Court's prior rulings are controlling with respect to the issues presented by the motion. The Plaintiffs suggest only that the entry of final judgment on the Plaintiffs' FCRA and ERISA claims be withheld under Rule 54, as was done before, pending a resolution of the case as a whole.

Accordingly, the Defendants' Motion for Summary Judgment (Doc. 238) is GRANTED and summary judgment will be entered in favor of the Defendants and against the following Plaintiffs with respect to any FCRA or other state law claims they may have had against the Defendants. Those Plaintiffs are: Linda Baldwin, Philip Bassa, Cynthia Behrens-Boga, Richard Boreman, Linda Boyle, Gerald Brannen, Donald Breeden, Robert Bunch, Polly Gillespie, Ralph Graves, Thomas Hays, Gopal Hegde, Gloria Maxwell, Thomas Neaman, William Passmore, David Reed, Patti Schmidt, Randy Seifert, Darwin Shiflett, Jiri Skala, William Sullivan, Steve Twitty, Wendy Wheeler, Barry Wood, Willis Barnes, Elaine Barnes-Foster, Patsy Baynard, Gary Becker, Donald Broeckel, Richard Brown, Judith Carey, Charles Coffman, Kenneth Corbett,

Tom Engers, Gwendolyn Evans, Ray Forehand, M.W. Foster, Robert Freeland, Valerie Fronza, Narendra Garg, Michael Harmeling, Eugene Hayward, Roy Hooks, Carrie Jones, G.E. Lamm II, Thomas Livingston, Ray Long, John Mascoll, Mary McCoy, Carol McFadden, Michael Moore, David Morris, Adolfo Paz, Mark Peterson, Andre Poullard, Dan Putnam, Bill Rich, Alexa Richardson, Terrence Ryan, Lorene Scott, Terrie Scott, John Serba, Patricia Solki, Robert Urban, David Visser, Daniel Wagner, Gary Waldo, Dale Wilson, and Guy Zissimopulos.

In addition, the Defendants' motion for summary judgment (Doc. 238) is GRANTED and summary judgment will be entered in favor of the Defendants and against all Plaintiffs with respect to any ERISA claims any Plaintiffs may have had against the Defendants. Entry of final judgment to that effect will be withheld under Federal Rule of Civil Procedure 54 pending resolution of the case as a whole.

Defendants' Motion To Decertify (Doc. 221)

The Defendants move to decertify the Plaintiffs' class on the ground that the members of the class are not "similarly situated" within the meaning of the statute under which the class was previously certified. 29 USC § 216(b) made applicable to ADEA cases by 29 USC § 226(b). They argue, convincingly, that the Plaintiffs' claims are dissimilar because they worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at

different times by different decision makers based on different considerations of criteria. Also, if the Plaintiffs or any of them prevail, the case of each will vary according to the selection of an individual remedy – the calculation of damages, including resolution of issues of mitigation, or the appropriateness of equitable relief including the possibility of reinstatement.

The only real connection between the Plaintiffs as a class – their "similarily situated" relationship – lies in the fact that they were all employees of the Defendants who were over 40 and were discharged during and because of a planned reduction in force carried out by the Defendants on or after July 1, 1993. To my mind, therefore, whether the class should be decertified depends entirely upon an issue of law, namely, the question of whether the disparate impact theory[1] is an available mode of proof under the ADEA as it is under Title VII of the Civil Rights Act. The Supreme Court has never decided whether a disparate impact theory of liability is available under the ADEA, *Hazen Paper Company v. Biggins*, 507 U.S. 604, 610, 113 S.Ct. 1701, 1706 (1993), and neither has the Eleventh

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[1] *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1854-55, n.15 (1977):

> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. See *infra*, at 1861. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory. [citations omitted]

Circuit. *Turlington, v. Atlanta Gas Light Co.*, 135 F.3d 1428, 1436-37, n.17 (1998).

The other circuits are remarkably divided on the issue. The Second, Eighth and Ninth Circuits have held that the disparate impact theory is applicable to the ADEA.[2] The First, Seventh and Tenth Circuits have held that it is not.[3] The Sixth Circuit[4] and at least one judge in the Third Circuit,[5] like the Eleventh, have not decided the question but have expressed doubt in the wake of *Hazen* that the theory is available under the ADEA. The Fourth, Fifth and D.C. Circuits have not discussed the problem.

I conclude that the disparate impact theory of liability is not applicable to ADEA claims. The decision of the Tenth Circuit to that effect in *Ellis, supra*, n. 3. is the most comprehensive and the most persuasive of the authorities on point, and no useful purpose would be served by elaborating here upon the opinion of the Tenth Circuit there.

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[2] See *Criley v. Delta Airlines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *Lewis v. Aerospace Community Credit Union*, 114 F.3d 745, 750 (8th Cir. 1997); and *Arnett v. California Public Employees Retirement System*, 179 F.3d 641, 647-48 (9th Cir. 1999).

[3] *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-703 (1st Cir. 1999); *Blackwell v. Cole Taylor Bank*, 152 F.3d 666, 672 (7th Cir. 1998); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-1009 (10th Cir. 1996).

[4] *Lyon v. Ohio Education Ass'n.*, 53 F.3d 135, 139-40 and n.5 (6th Cir. 1995).

[5] *DiBiase v. Smith Kline Beechman Corporation*, 48 F.3d 719, 734 (3d Cir. 1995).

I conclude as a matter of law, therefore, that the disparate impact theory of liability in employment discrimination cases does not apply to ADEA claims; and, having so determined, I also conclude that the named Plaintiffs in this action are not "similarly situated" in relation to the other members of the putative class. Stripped of the disparate impact theory and forced to rely individually upon proof of disparate treatment, the individual features of each claim predominate over the common ones and the Motion to Decertify (Doc. 221) must be GRANTED.

In reaching this conclusion I have not overlooked the Plaintiffs' apparent contention that their theory of liability can also be categorized as a disparate *treatment* theory in the sense that the overall reduction in force was allegedly conceived as a means of eliminating older employees in general, not as a cost-saving economic measure; but, even if that could be proved, there would be no causal relationship between that upper management decision and the termination of individual employees where the ultimate decision maker was a lower level supervisor who was not informed of upper management's unlawful intent and who ostensibly acted in good faith in selecting the individual Plaintiff for separation on the basis of factors other than age. In other words, it would still be necessary to examine the motives of the person who decided to fire each Plaintiff, individually, and that individual characteristic of the claim of each Plaintiff predominates over any remaining common features of the claims.

Neither have I overlooked the Defendants' obvious position that even if a disparate impact analysis should

be applied, the adverse effect of the downsizing upon ADEA protected employees was justified by a business necessity. But the issue of whether the Plaintiffs could ever prove the facts necessary to establish a disparate impact case, or whether the Defendants could successfully defend by proving business necessity, is simply not before the Court at this moment. Rather, the lone immediate issue is whether the Plaintiffs, as a class, should be given the opportunity to prove a disparate impact case.

I am also of the view, however, that the legal issue driving this decision to decertify the class – the inapplicability of the disparate impact theory to ADEA cases – is a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from [this] order may materially advance the ultimate termination of the litigation." 28 USC § 1292(b). By decertifying the class, an enormous amount of time, energy and cost will likely be expended in the near future as counsel and the parties undertake to pursue discovery and otherwise litigate the 116 individual claims that will be revived in the parallel case of *Akin v. Florida Power Corporation*, Case No. 97-173 Civ-OC. Yet, if I am wrong, much of that time, energy and cost may well be wasted. The only downside to an immediate interlocutory appeal is the additional time required by the appellate process in a case in which the court is already acutely conscious of its age (caused in large part by the Court's own delay in reaching and deciding the pending motions). It is to be hoped, however, that some of the time consumed by an appeal will actually operate to conserve some of the remaining time to be expended in

disposing of the litigation as a whole. Also, there is ample precedent in the law of this circuit for making a Section 1292(b) certificate to the Court of Appeals regarding controlling issues of law in deciding class action issues in ADEA cases. See, *Grayson v. K-Mart Corp.*, 79 F.3d 1066 (11th Cir. 1996). See also, *Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374 (1998) *en banc*.

Before the case is certified for immediate appeal, however, the parties should be given an opportunity to be heard concerning that important step.

It is therefore Ordered that the parties show cause, if any, by written memoranda to be filed within twenty (20) days why the Court should not certify this Order under 28 USC § 1292(b) to the United States Court of Appeals for the Eleventh Circuit to the extent that it decertifies the Plaintiffs' class on the legal basis that the disparate impact theory of liability is not available in ADEA cases. The parties are also directed to show cause, if any, why the *Adams* case should not be dismissed as duplicative (given decertification of the class), coupled with a simultaneous reopening of the *Akin* case to be followed, then, by another directive that all proceedings in *Akin* be stayed pending outcome of the appeal in *Adams*.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 26th day of August, 1999.

/s/ Hon. Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

c: Counsel of Record

APPENDIX C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS,
et al.,

Plaintiffs,

Case No.
95-123 CIV-OC-10A

-vs-

FLORIDA POWER
CORPORATION, et al.,

Defendants.
_____/

ORDER OF CERTIFICATION
Pursuant to 28 USC § 1292(b)

(Filed Oct. 27, 1999)

By Order entered on August 26, 1999 (Doc. 302), the Court decertified the Plaintiff class on the legal basis that the "disparate impact" theory of proof is inapplicable to ADEA claims and, absent the Plaintiffs' ability to rely upon that theory to prove liability, the individual aspects of their claims clearly predominate over any common issues so that class adjudication would be unmanageable and inappropriate. Stated another way using the terms of the governing statute (29 USC § 216(b)), the Plaintiff class would not consist of "employees similarly situated."

In the Order of August 26 I also expressed the view that the legal issue driving the decision to decertify the class – the inapplicability of the disparate impact theory to ADEA cases – is a "controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal . . . may materially

advance the ultimate termination of the litigation." 28 USC § 1292(b). The parties were therefore invited to comment on the question whether the case should be certified for interlocutory appeal under § 1292(b).

The Plaintiffs' response (Doc. 304) supports certification of the issue for appeal. The Defendants' response (Doc. 305) opposes such certification. They argue that whether the disparate impact theory of liability applies to ADEA claims is not a "controlling issue of law," and that even if the issue should be resolved in favor of the Plaintiffs, the disparate *treatment* claims of the individual Plaintiffs must still be litigated.[1] I find these arguments unpersuasive. The disparate impact question is clearly a controlling question on the issue of liability *to the class*. And, while individual damages issues and/or certain individual defenses may remain even if Plaintiffs are permitted to pursue that theory and do so successfully, such a result may well moot the individual disparate *treatment* claims as a separate theory of liability. In short, and in simplest terms, whether I am right or wrong in ruling that the disparate impact theory of liability is unavailable to these Plaintiffs is a critical issue that ought be resolved with finality before the Court can reasonably proceed with the management of this litigation toward

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[1] The Defendants also mount factual arguments designed to show that the Plaintiffs were the subjects of an individualized selection process and that there was no general policy or practice having any disparate impact upon the Plaintiffs as a class. But these contentions simply miss the present point. The present issue is not whether the Plaintiffs can prove a disparate impact case, but whether as a matter of law they should be given any opportunity to do so.

trial whether as a class action or as a series of individual claims.[2]

Accordingly, pursuant to 28 USC § 1292(b), I hereby certify to the United States Court of Appeals for the Eleventh Circuit that the Order on Pending Motions (Doc. 302) entered by me in this action on August 26, 1999, granting the Defendants' Motion to Decertify (Doc. 221), involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the Order (Doc. 302) may materially advance the ultimate termination of the litigation. The controlling question of law is whether the "disparate impact" theory or method of proving liability (see *Griggs v. Duke Power Company*, 401 U.S. 424, 91 S.Ct. 849 (1971), and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 1854-55, n.15 (1977)), is applicable to claims brought under the Age Discrimination in Employment Act, 29 USC § 621, et seq.

IT IS SO ORDERED.

DONE AND ORDERED at Ocala, Florida, this 27th day of October, 1999.

/s/ Hon. Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

c: Counsel of Record

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[2] The individual claims have been brought in a separate, parallel action. *Akin v. Florida Power Corporation*, Case No. 97-173 Civ.Oc.

Supreme Court, U.S.
FILED
OCT 31 2001
OFFICE OF THE CLERK

(2)

No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether and, if so, in what circumstances disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34.

CORPORATE DISCLOSURE STATEMENT

Respondent Florida Power Corporation is a wholly-owned subsidiary of respondent Florida Progress Corporation, which is in turn a wholly-owned subsidiary of Progress Energy Corporation. Progress Energy Corporation has issued stock to the public, and the only publicly-held company owning more than 10% of its stock is State Street Bank and Trust Co.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

STATEMENT 2

REASONS FOR DENYING THE WRIT 5

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER AND, IF SO, IN WHAT CIRCUMSTANCES THE ADEA RECOGNIZES DISPARATE IMPACT CLAIMS 5

II. THE PURPORTED CIRCUIT SPLIT IS NEITHER AS PROFOUND NOR AS SEVERE AS THE PETITION SUGGESTS 9

III. THE DECISION BELOW WAS CORRECTLY DECIDED AND DOES NOT REQUIRE REVIEW BY THIS COURT 12

CONCLUSION 15

TABLE OF AUTHORITIES

Case **Page**

Anderson v. Douglas & Lomason Co., 26 F.3d 1277 (5th Cir. 1994) 7
Arnett v. California Pub. Employees Retirement Sys., 179 F.3d 690 (9th Cir. 1999), *vacated and remanded*, 528 U.S. 1111 (2000) 11
Coleman v. Quaker Oats Co., 232 F.3d 1271 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2592 (2001) 11
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 10, 13
District Council 37, AFSCME v. New York City Dep't of Parks and Recreation, 113 F.3d 347 (2d Cir. 1997) 10
EEOC v. Francis W. Parker School, 515 U.S. 1142 (1995) 2
EEOC v. Francis W. Parker School, 41 F.3d 1073 (7th Cir. 1994), *cert denied*, 515 U.S. 1142 (1995) . . 10
EEOC v. Local 350, Plumbers and Pipefitters, 998 F.2d 641 (9th Cir. 1993) 10
EEOC v. Wyoming, 460 U.S. 226 (1988) 13
Ellis v. United Airlines, Inc., 517 U.S. 1245 (1996) 2
Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996) . 4, 10
Frank v. United Airlines, 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1247 (2001) 11
Geller v. Markam, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 9
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) . *passim*

TABLE OF AUTHORITIES
(Continued)

Page

Houghton v. SIPCO, Inc., 38 F.3d 953 (8th Cir. 1994) 10
Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union, 53 F.3d 135 (6th Cir. 1995) 10
Markham v. Geller, 451 U.S. 945 (1981) 12
Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) 12
Mooney v. ARAMCO Servs. Co., 54 F.3d 1207 (5th Cir. 1995) 8
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999) 4, 10
Mullin v. Raytheon Co., 528 U.S. 811 (1999) 2
Ohio Pub. Employee Retirement Sys. v. Betts, 492 U.S. 158 (1989) 13
Rhodes v. Guiberson Oil Tools, 75 F.3d 989 (5th Cir. 1996) 10
Secretary of State of Maryland v. Munson, 467 U.S. 947 (1984) 7
Smith v. City of Des Moines, Iowa, 99 F.3d 1466 (8th Cir. 1997) 11
Smith v. Xerox Corp., 196 F.3d 358 (2d Cir. 1999) . . 7, 11
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 13
United Airlines, Inc. v. Frank, 121 S. Ct. 1247 (2001) . . 2
Virginia Military Inst. v. United States, 508 U.S. 946 (1993) 8
Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989) 6
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 6

TABLE OF AUTHORITIES
(Continued)

Page

Federal Statutes

Age Discrimination in Employment Act,
29 U.S.C. §§ 621-34 1
29 U.S.C. § 621(a)(2) 14
29 U.S.C. § 622 14
29 U.S.C. § 623 . . . . . 12, 13
29 U.S.C. § 626 4
29 U.S.C. § 216(b) 4, 8
Energy Policy Act of 1992, 106 Stat. 2776 (1992) 2

Miscellaneous

Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) 12, 13
Ramona L. Paetzold & Steven L. Wellborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 5.03 (1999) 6
Evan H. Pontz, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev 267 (1995) 9
Report of the Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* (1965) 14

Respondents Florida Power Corporation and Florida Progress Corporation respectfully submit this brief in opposition to the petition for a writ of certiorari in this case.

INTRODUCTION

Although the lower courts are currently split over the question whether disparate impact claims are cognizable under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, the petition for a writ of certiorari in this case should be denied for three reasons.

First, and foremost, this case is not an appropriate vehicle for considering the question whether and, if so, under what circumstances disparate impact claims may be raised under the ADEA because it lacks the clear and cogent set of facts needed to facilitate this Court's analysis of that question. As Judge Barkett recognized in her separate concurrence, Pet. App. 9a, petitioners in this case failed adequately to allege valid disparate impact claims; the question whether the ADEA recognizes disparate impact claims arose in this case in the context of a class decertification motion (and not in the context of a ruling on the merits); and the question was presented on interlocutory appeal in an abstract and, for this Court's purposes, therefore unhelpful context.

Second, there is no compelling need to resolve the status of disparate impact claims under the ADEA now. The purported judicial conflict is not as substantial as the petition suggests. Moreover, because no reasoned appellate court decision has recognized disparate impact claims under the ADEA since this Court's opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), further consideration of the question by the lower courts would either resolve the conflict among them or sharpen it by provoking a reasoned defense of recognizing such claims.

Third, the decision below is correct and therefore does not require review by this Court. As courts, commentators, and Justices of this Court have recognized, *see infra* p. 12, the text

of the statute, its purposes, and history demonstrate that disparate impact claims should not be cognizable under the ADEA.

Accordingly, as it has done at least four times in the recent past, *see, e.g.*, *United Airlines, Inc. v. Frank*, 121 S. Ct. 1247 (2001); *Mullin v. Raytheon Co.*, 528 U.S. 811 (1999); *Ellis v. United Airlines, Inc.*, 517 U.S. 1245 (1996); *EEOC v. Francis W. Parker School*, 515 U.S. 1142 (1995), this Court should deny the petition and thus defer its consideration of whether and, if so, in what circumstances disparate impact claims may properly be raised under the ADEA.

STATEMENT

1. Respondent Florida Power Corporation produces, transmits, and distributes electrical power in Florida. In 1992, the company was a regulated utility with seventeen fossil fuel and one nuclear power plants, more than three dozen district or division offices, and thousands of employees spread out over a service area covering approximately two thousand miles. R.229 (Att. A ¶¶ 3-4). That year, Congress passed the Energy Policy Act of 1992, 106 Stat. 2776 (1992), with the express purpose of exposing utilities such as Florida Power to greater levels of competition. To prepare for this competition, Florida Power underwent a series of reorganizations during which more than 1,200 positions were eliminated. Pet. App. 2a; R.229 (Att. A ¶ 5).

2. Petitioners are former Florida Power employees, from throughout the Florida Power workforce, who are age 40 and over and who were terminated during the company's various reorganizations. Pet. App. 22a-23a. In 1995, fifteen of these former employees sued Florida Power and its parent, respondent Florida Progress Corporation, in the Middle District of Florida for, among other things, alleged violations of the ADEA. Through a series of six amended complaints, another forty-one petitioners were added as well as a putative class of

older employees terminated by Florida Power. Resp. App. 2a-11a. In December 1996, the District Court conditionally certified an opt-in class in an effort to facilitate settlement. Resp. App. 6a. In addition, along with several of the later joined plaintiffs, sixty or so of the individuals who opted into the class filed a suit that the District Court described as a "carbon copy" of this one. Resp. App. 8a.

3. As petitioners acknowledge, Pet. 9 n.3, the allegations in the sixth amended complaint relating to each of the plaintiffs are identical. Most of the allegations in the complaint focus upon an alleged pattern and practice of intentional age discrimination supposedly adopted by Florida Power to change the company's image and reduce its salary and pension costs. Sixth Amended Complaint ¶¶ 22-26, 31. The complaint also contains a single paragraph relating to each plaintiff purporting to allege a disparate impact claim:

> The defendants' discriminatory acts complained of in this sixth amended complaint had a disproportionate impact on older employees in that the defendants' practice or policy regarding the defendants' reduction in force had a significant adverse effect on older employees. The defendants had alternative means with a lesser discriminatory impact that could have equally well served the defendants' needs if the defendant was in fact going through a reduction in force. The defendants' reduction in force policy had a greater impact on members of the protected class than on employees under age 40.

Id. ¶ 36. The complaint does not identify the "defendants' practice or policy regarding the defendants' reduction in force" mentioned in this paragraph.

4. After settlement negotiations failed, respondents moved to decertify the class that had been conditionally certified by the District Court. Finding that the petitioners were not "similarly situated," as required for collective actions under the ADEA,

see 29 U.S.C. § 216(b); *see also id.* § 626(b) (incorporating 29 U.S.C. § 216(b) into the ADEA), the District Court granted the motion to decertify. The court found that petitioners' disparate treatment claims were dissimilar because petitioners were "terminated at different times by different decision makers based on different considerations o[r] criteria." Pet. App. 22a-23a. The court also rejected the suggestion that petitioners were "similarly situated" as a result of their disparate impact claims for the simple reason that "the disparate impact theory of liability is not applicable to ADEA claims." Pet. App. 24a.

5. Although respondents argued that petitioners' claims would be dissimilar even if they could bring disparate impact claims—because there was no general policy or practice that allegedly disparately impacted petitioners, and because any disparate impact claims would be subject to discrete defenses—the District Court found that the question whether disparate impact claims are cognizable under the ADEA was a controlling question of law. In so doing, the District Court reasoned that, because of the parallel suit involving the class members, it would have to resolve whether disparate impact claims are cognizable under the ADEA regardless of its decision on class certification. Pet. App. 29a-30a. Accordingly, the District Court certified for interlocutory appeal the question whether the ADEA recognizes disparate impact claims. Pet. App. 30a.

6. The Eleventh Circuit affirmed. Although all members of the panel recognized that the procedural posture of the case made answering the certified question a "pronouncement in the abstract," Pet. App. 2a n.1 (quotation omitted); *id.* at 9a (Barkett, J., specially concurring), the majority addressed the question and held, relying upon the reasoning of the First Circuit in *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999), and the Tenth Circuit in *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir.), *cert.*

denied, 517 U.S. 1245 (1996), that disparate impact claims are not cognizable under the ADEA. Pet. App. 6a-8a.

7. Judge Barkett concurred in the panel's judgment only. Although she was of the view that the ADEA recognizes disparate impact claims, Pet. App. 9a-18a (Barkett, J., specially concurring), Judge Barkett concluded that the District Court's decertification order was nonetheless correct and that it was "unnecessary and premature to address the question whether disparate impact claims are cognizable under the ADEA." Pet. App. 9a. The pleadings, she observed, failed properly to "plead[] a disparate impact claim sufficient to qualify for class certification." *Id.* Judge Barkett also observed that it was unwise to consider the question whether the ADEA recognizes disparate impact claims because "this question does not lend itself to a pronouncement in the abstract." *Id.* She therefore concluded that it would be best to affirm the District Court's decertification order without considering the disparate impact question that the District Court had certified for interlocutory review. *Id.* & n.1.

8. Following the Eleventh Circuit's ruling, the District Court reactivated the parallel suit brought by members of the decertified class, which had been abated in light of the preliminary certification of the class. Resp. App. 11a-13a.

REASONS FOR DENYING THE WRIT

I. THIS CASE IS NOT AN APPROPRIATE VEHICLE FOR RESOLVING WHETHER AND, IF SO, IN WHAT CIRCUMSTANCES THE ADEA RECOGNIZES DISPARATE IMPACT CLAIMS

The petition asks this Court to decide whether and, if so, in what circumstances a disparate impact claim may be recognized under the ADEA. But it would not be prudent to use this case for deciding that question. As Judge Barkett recognized in her concurrence, petitioners did not properly plead a disparate impact claim in their complaint; and, because the issue arose

below in the context of a decertification ruling (rather than a ruling on the merits), the interlocutory appeal before the court below raised that question in an abstract and unhelpful context. Whether or not the majority below was correct in disregarding these concerns and deciding the certified question before it, those concerns demonstrate that this case lacks the factual base requisite for thoughtful analysis of the question presented by this Court and that this case is not an appropriate vehicle for considering, on discretionary certiorari review, whether and, if so, in what circumstances disparate impact claims are cognizable under the ADEA. Interlocutory appeals are generally not good vehicles for deciding questions on certiorari; and, in any event, this Court should decide such a question only in a case where the claim is well-pleaded and supported by a factual record that facilitates legal analysis.

First, the question whether a disparate impact claim is cognizable under the ADEA is entirely academic here, because the petitioners have failed to state a valid disparate impact claim. Because disparate impact claims "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another," *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) (quotation omitted), a party asserting a disparate impact claim must "begin by identifying the specific employment practice that is challenged." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.); *accord Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656-57 (1989): *see generally* Ramona L. Paetzold & Steven L. Wellborn, *The Statistics of Discrimination: Using Statistical Evidence in Discrimination Cases* § 5.03 (1999). As Judge Barkett found in her concurrence below, petitioners have not satisfied this threshold requirement: Far from identifying a specific practice or set of practices disadvantaging them, petitioners simply allege that "defendants' practice or policy regarding the defendants' reduction in force" had a disparate impact on older employees without identifying those practices.

Sixth Amended Complaint ¶ 36. Especially where, as here, members of the protected class were "terminated at different times, by different decision makers, based on different considerations o[r] criteria," Pet. App. 22a-23a, such vague allegations are legally insufficient. *See, e.g., Smith v. Xerox Corp.*, 196 F.3d 358, 367 (2d Cir. 1999); *Anderson v. Douglas & Lomason Co.*, 26 F.3d 1277, 1284 (5th Cir. 1994).

Second, this case does not present the question whether and, if so, in what circumstances disparate impact claims are cognizable under the ADEA in a helpful context for decision by this Court. Because petitioners' disparate impact allegations are conclusory, and because no facts supporting a disparate impact claim were presented in the motion to decertify below, the record underlying these allegations is undeveloped and therefore required what all members of the panel below acknowledged as a "pronouncement in the abstract." Pet. App. 2a n.1 (quotation omitted); Pet. App. 9a (Barkett, J., specially concurring). Any effort to resolve such a question on certiorari would, however, be seriously hampered by both the lack of a concrete, well-pleaded disparate impact claim and the lack of a clear and cogent set of facts serving as a base for the Court's legal analysis. *See, e.g., Secretary of State of Maryland v. Munson*, 467 U.S. 947, 977 (1984) (Rehnquist, J., dissenting) (noting that decisions based upon well developed factual records are likely to be "more sound" because "the facts of the case focus and give meaning to the otherwise abstract and amorphous issues the court must decide"). As a consequence, it would be more prudent to address the question whether disparate impact claims may lie under the ADEA in the context of a record that is adequately developed and that therefore crystallizes the issue; indeed, without such a record, the Court simply cannot sensibly determine, as petitioners request (Pet. 4, 16-17), the circumstances, if any, in which a disparate impact claim would be appropriate under the ADEA.

Third, resolving whether the ADEA recognizes disparate impact claims will not resolve this case. *See, e.g.*, *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.) (noting that this Court will "generally await final judgment . . . before exercising [its] certiorari jurisdiction"). Because the case was before the Eleventh Circuit on an interlocutory appeal from a class decertification order, the case will continue no matter how this Court rules on the cognizability of disparate impact claims under the ADEA. Indeed, because the members of the putative class have filed a parallel action, they may be able to pursue their claims no matter what happens on the decertification motion. *See supra* pp. 3, 5. Finally, it is not even clear that a ruling in the petitioners' favor would protect their opt-in class from decertification. As noted above, they have failed to allege valid disparate impact claims, and, because they were "terminated at different times by different decision makers based on different considerations o[r] criteria," Pet. App. 22a-23a, they cannot even identify a single practice disparately impacting all of them (and thus are not "similarly situated" as required by 29 U.S.C. § 216(b)). *See, e.g., Mooney v. ARAMCO Servs. Co.*, 54 F.3d 1207, 1213-15 (5th Cir. 1995) (discussing standards for determining whether parties are "similarly situated"); *see also id.* at 1213 (noting that classes are rarely certified for trial under the ADEA).

In short, this case is a poor vehicle for considering whether, and, if so, in what circumstances disparate impact claims are cognizable under the ADEA. The question arises without a record developed about the claims in this case; the complaint is without sufficient allegations to present the question; and resolution of the question would not fully or finally resolve this case.

II. THE PURPORTED CIRCUIT SPLIT IS NEITHER AS PROFOUND NOR AS SEVERE AS THE PETITION SUGGESTS

In any event, this Court would benefit from further consideration by the lower courts of the question whether the ADEA allows disparate impact claims before addressing that question itself. Although the petition suggests that "[i]t is hard to conceive of a case presenting a clearer example of conflict in the circuits," Pet. at 14, the circuit split is neither as profound nor as severe as the petition suggests. In fact, the decision below is supported by every reasoned appellate court decision on the subject; and since this Court's 1993 decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, a number of courts of appeal have reversed their prior positions in agreement with the decision below. As a consequence, there is reason to believe that the judicial conflict over whether the ADEA recognizes disparate impact claims may resolve itself through further consideration by the lower courts; and, even if the courts of appeals do not resolve the conflict themselves, further lower court consideration of the issue may provoke a thoughtful rather than reactive application of disparate impact theory under the ADEA, thereby sharpening the issue for this Court's ultimate consideration.

Since this Court's decision in *Hazen Paper Co. v. Biggins*, "there is a clear trend toward concluding that the ADEA does not support a disparate impact claim." *Ellis*, 73 F.3d at 1009. Prior to *Hazen Paper*, some lower courts had carried over disparate impact law from Title VII to the ADEA, but they did so with little analysis. *See, e.g., Geller v. Markam*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *see generally* Evan H. Pontz, *What a Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 287 (1995). After *Hazen Paper* cast doubt upon those decisions, *see* 507 U.S. at 618 (Kennedy, J., concurring) (noting that

"there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA"), a number of courts of appeals reexamined the issue and determined that disparate impact claims are not recognized under the ADEA.

For example, after close analysis of the text of the statute, its purposes and legislative history, as well as practical considerations, both the Seventh and Tenth Circuits reversed prior decisions and held that disparate impact claims are not cognizable under the ADEA. *See EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1076-78 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995); *Ellis*, 73 F.3d at 1006-10. Engaging in a similar analysis, the First Circuit concurred, *see Mullin*, 164 F.3d at 699-704, and opinions from still other circuits have expressed support for this position. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1004 (5th Cir. 1996) (en banc) (DeMoss, J., concurring in part and dissenting in part) ("*Hazen Paper* indicates that disparate impact theory is not available under the ADEA."); *Lyon v. Ohio Educ. Ass'n & Prof'l Staff Union*, 53 F.3d 135, 139 n.5 (6th Cir. 1995) (expressing "considerable doubt as to whether a claim of age discrimination may exist under a disparate impact theory" in an ADEA case); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732-34 (3d Cir. 1995) (opinion of Greenberg, J.) (same).

Following *Hazen Paper*, three circuits—the Second, the Eighth, and the Ninth—have continued to recognize disparate impact claims under the ADEA. Notably, however, none of these circuits has actually analyzed anew whether such claims are properly recognized. Instead, noting that *Hazen Paper* did not formally resolve the issue, these courts have chosen to follow their pre-*Hazen Paper* precedent without any discussion of the substance of that precedent. *See, e.g., District Council 37, AFSCME v. New York City Dep't of Parks and Recreation*, 113 F.3d 347, 351 (2d Cir. 1997); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 958-59 (8th Cir. 1994); *EEOC v. Local 350,*

Plumbers and Pipefitters, 998 F.2d 641, 648 n.2 (9th Cir. 1993). Moreover, because the cases recognizing disparate impact claims in the Second and Eighth Circuits were all resolved against the plaintiffs, the recognition of disparate impact in those circuits was actually dicta; only the Ninth Circuit has actually upheld a disparate impact claim on appeal since *Hazen Paper*. *See Frank v. United Airlines*, 216 F.3d 845, 856 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1247 (2001); *Arnett v. California Pub. Employees Retirement Sys.*, 179 F.3d 690, 696-97 (9th Cir. 1999), *vacated and remanded*, 528 U.S. 111 (2000). Finally, opinions from each of the three circuits continuing to recognize disparate impact claims under the ADEA have expressed discomfort with doing so. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291 n.6, 1292 n.7 (9th Cir. 2000) (noting that the circuit has "continued to *assume* that this [disparate impact] theory is still viable after *Hazen Paper*") (emphasis added), *cert. denied*, 121 S. Ct. 2592 (2001); *Smith v. Xerox Corp.*, 196 F.3d at 366 n.5 (noting that the circuit has analyzed disparate impact claims under the ADEA "without discussion"); *Smith v. City of Des Moines, Iowa*, 99 F.3d 1466, 1470 (8th Cir. 1997) (noting that the panel was bound by prior precedent "even if we believed that *Hazen Paper* cast doubt on the validity" of that precedent). Accordingly, should these circuits reconsider whether disparate impact claims are cognizable under the ADEA, they may, like the Seventh and Tenth Circuits before them, reverse their prior positions and find that such claims are not cognizable under the ADEA.

Finally, even if the Second, Eighth, and Ninth Circuits do not reverse their current positions, further lower court consideration of the status of disparate impact claims under the ADEA may better illuminate the question whether the ADEA properly recognizes such claims. The opinions concluding that the ADEA recognizes disparate impact claims have so far failed to offer any justification for doing so beyond the similarities in some of the language of Title VII and the ADEA. The

thorough reasoning of the opinions rejecting such claims may force any future opinions adopting the contrary position to conduct a more searching analysis, which in turn may sharpen the issue and facilitate this Court's resolution of it. Thus, whether or not further future lower court decisions resolve the current conflict, this Court would benefit from further lower court consideration of the status of disparate impact claims under the ADEA.

III. THE DECISION BELOW WAS CORRECTLY DECIDED AND DOES NOT REQUIRE REVIEW BY THIS COURT

Finally, although this Court does not sit to correct errors, it is noteworthy that there was no error committed by the court below and thus there is no reason to review that court's abstract interlocutory decision. As various courts, commentators, and Justices of this Court have recognized, the ADEA does not properly recognize disparate impact claims. *See supra* p. 10 (listing cases); *accord Markham v. Geller*, 451 U.S. 945, 948-49 (1981) (Rehnquist, J., dissenting from denial of certiorari); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1216-20 (7th Cir. 1987) (Easterbrook, J., dissenting); Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982); *see also Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring) (citing *Markham*, *Metz*, and Krop with favor). In addition to failing to remedy the deficiencies in the complaint and the record that make this case a poor vehicle for considering this issue, the arguments in favor of recognizing disparate impact claims under the ADEA set forth in the petition are wholly unpersuasive and, for present purposes, can be easily, and briefly, disposed of.

Petitioners initially err in contending that the "plain language" of the ADEA supports disparate impact claims because Section 623(a)(2) of the Act "imposes liability for employment practices that 'adversely' affect an employee's 'status.'" Pet. 17 (quotation omitted). As several authorities

cited by petitioners recognize, this is a "grammatically incorrect reading." *DiBiase*, 48 F.3d at 733 (opinion of Greenberg, J.); *see also* Krop, *supra*, 34 Stan. L. Rev. at 842-43 & n.27. Section 623(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a) (emphasis added). The comma after the word "employee" demonstrates that the phrase "because of such individual's age" modifies not the reference to adverse effects, but the conduct in the entire clause preceding it. As a consequence, Section 623(a)(2) prohibits the limiting, segregating, or classifying of an individual "because of that individual's age" in a way that would adversely affect the individual—that is, it prohibits disparate treatment that injures older individuals, not all conduct that disparately impacts them.

Petitioners similarly err in contending that the "reasonable factors other than age" provision in Section 623(f)(1) must be construed as an affirmative defense against disparate impact claims. Pet. 20-21. This provision is better understood to be a "definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (interpreting Title VII), just as this Court held that the "*bona fide* employee benefit plan" provision in an earlier version of Section 623(f)(2) was a definitional provision and not an affirmative defense. *See Ohio Pub. Employee Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989). Indeed, this Court has already held that a "reasonable factor" other than age is simply one that is "neutral" and "not directly dependent on age" and therefore not a pretext for discrimination. *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1988); *see also Hazen Paper*, 507 U.S. at 612-13 (suggesting that an employer may violate the ADEA by intentionally using a factor other than age as a proxy for age).

Petitioners further err in criticizing (Pet. 18) the First and Tenth Circuits for relying upon the Secretary of Labor's 1965 report to Congress on age discrimination on the ground that the report is neither dispositive nor binding. As the decision below recognized, Pet. App. 7a-8a, the report distinguishes between what are now known as disparate treatment and disparate impact by recommending that Congress bar "arbitrary age discrimination"—which it understood to be "employer policies of not hiring people over a certain age, *without consideration of a particular applicant's individual qualifications*"—but deal with neutral practices that disproportionately impact the elderly through public education, counseling, training, and other reform measures. Report of the Secretary of Labor, *The Older American Workers: Age Discrimination in Employment* 6, 11, 15 (1965) (emphasis added). Moreover, Congress incorporated this dichotomy between "arbitrary age discrimination" and practices that adversely impact the elderly directly into the statute. *See, e.g.*, 29 U.S.C. § 621(a)(2) (distinguishing between the "setting of arbitrary age limits regardless of potential for job performance" and "practices that may work to the disadvantage of older persons"); *see also id.* § 622 (authorizing education and research programs). Thus, while it may not be binding or dispositive, the Secretary of Labor's 1965 report on age discrimination provides powerful support for the Eleventh Circuit's conclusion that the ADEA does not recognize disparate impact claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: October 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES AKIN, et al.,

Plaintiffs,

CASE NO. 917-173-Civ-Oc-10C

-vs-

FLORIDA POWER CORPORATION,
and FLORIDA PROGRESS
CORPORATION,

Defendants.

WANDA L. ADAMS, et al.,

Plaintiffs,

CASE NO. 95-123-Civ-Oc-10A

-vs-

FLORIDA POWER CORPORATION,
and FLORIDA PROGRESS
CORPORATION,

Defendants.

FLORIDA POWER CORPORATION,

Defendant/Counterclaimant,

-vs-

JOE N. BRANNON, et al.,

Plaintiffs/Counterclaim Defendants.

ORDER ON PENDING MOTIONS

These cases come before the Court for deposition of several pending motions. Considerations of judicial and administrative economy and the need to expeditiously pursue a final resolution of these claims lead me to conclude that the *Akin* action should be abated and administratively closed subject to the right of the *Akin* plaintiffs to move to reopen that action should the class of plaintiffs in the *Adams* case be decertified. The Defendant's motion to dismiss *Akin* (Doc. 6) and the Plaintiffs' motion to consolidate (Doc. 12) *Akin* and *Adams* should therefore be denied. With respect to the motions pending in the *Adams* litigation, I conclude that the Defendants' motion to dismiss (Doc. 45) should be granted in part and denied in part; the Plaintiffs' motion for summary judgment (Doc. 30) on the Defendant Florida Power's counterclaim should be granted in part and denied in part; Florida Power's motion for summary judgment (Doc. 53) on the counterclaim should be granted in part and denied in part; Florida Power's motion for partial summary judgment (Doc. 167) should be granted; the Plaintiffs' motion to sever (Doc. 197) the claim of Kermit Lassiter should be granted; and the parties' joint motion to appoint a Magistrate Judge (Doc. 204) should be denied as moot.

BACKGROUND AND PROCEDURAL HISTORY[1]

Wanda Adams and fourteen other former employees of Florida Power Corporation ("Florida Power") commenced *Adams, et al. v. Florida Power Corporation, et al.*, 95-123-Civ-Oc-10A, with the filing of a complaint (Doc. 1) on July 5, 1995. The complaint alleged that Florida Power terminated the Plaintiffs' employment in connection with Florida Power's

[1] This unnecessarily lengthy and complex procedural history is, in part, the result of the Court's failure to promptly and attentively manage this case. The Court apologizes for the delay and attendant confusion.

redeployment and career transition programs that were implemented as components of a company-wide reduction in force. The Plaintiffs, all over forty years of age at the time of their respective terminations, alleged that they were targeted for discharge because of their age in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq*. (1994). Each Plaintiff claimed an entitlement to money damages, attorneys' fees and unspecified injunctive relief.

The complaint was never served on the Defendants, and, on September 28, 1995, the Plaintiffs filed an amended complaint (Doc. 3). The amended complaint differed from its predecessor in three significant respects. First, it added two additional former Florida Power employees as plaintiffs and named Florida Progress Corporation ("Florida Progress"), Florida Power's parent company, as a defendant. Second, each of the Plaintiffs asserted a claim of age discrimination (with respect to their terminations) under the Florida Civil Rights Act ("FCRA"), Fla. Stat. § 760.01, *et seq*. (1997).[2] Finally, each of the Plaintiffs claimed that they were beneficiaries under employee benefit plans administered by the Defendants and that they were discharged from employment in an attempt to prevent them from securing benefits under those plans in violation of Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140 (1994).

[2] Because the FCRA borrows its principles of substantive liability from the ADEA, the claims under the two statutes are, on their merits, identical. *Fla. State Univ. v. Sondel*, 685 So. 2d 923, 925 n.1 (Fla. Dist. Ct. App. 1996). There are, however, significant differences between the two Acts with respect to the prosecution of administrative remedies, statutes of limitation and punitive damage awards. *Cf.* 29 U.S.C. § 626(c),(d),(e); Fla. Stat. § 760.11.

The amended complaint purported only to assert the claims of the several individual Plaintiffs; however, on November 30, 1995, the Plaintiffs filed a motion seeking class certification pursuant to 29 U.S.C. § 219(b) (1994) such that the Plaintiffs might represent themselves and "all others similarly situated."[3] Class certification was, of course, opposed by the Defendants (*See* Doc. 22).

Also on November 30, the Plaintiffs filed a motion (Doc. 9) seeking leave to file a second amended complaint. On March 12, 1996, after having initially stricken the motion for the Plaintiffs' failure to comply with Local Rule 3.01(g), the United States Magistrate Judge granted (Doc. 40) the Plaintiffs leave to amend.[4] The Plaintiffs filed their second amended complaint (Doc. 42) on March 19. The second amended complaint was identical to the first amended complaint in all

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[3] Class actions under the ADEA are to be distinguished from the ordinary class action commenced under Rule 23 of the Federal Rules of Civil Procedure. The ADEA adopts the procedures for certifying and prosecuting a class action established by the Fair Labor Standards Act, 29 U.S.C. § 216(b). 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 . . ., and 217 of this title . . ."). Thus, a class may be certified under the ADEA where the plaintiff employees are "similarly situated," whereas the putative class might otherwise have to meet the more stringent requirements of Rule 23(a) and (b). Additionally, while a Rule 23 class member, upon receiving notice of the action, would be required to opt out of the class in order to avoid being bound by the judgment, *see* FED. R. CIV. P. 23(c), a prospective ADEA class member must affirmatively opt into the class to be so bound. The effect of these differences on the propriety of class certification with respect to the Plaintiffs' ERISA and FCRA claims has not yet been addressed by the parties and, given the current posture of the case (*see infra* p. 9), the issue is presently moot.

[4] Rule 3.01(g), M.D. Fla. Rules, requires that a party filing a non-dispositive motion certify that it attempted to raise and resolve the issue contemplated by the motion with opposing counsel.

respects except that the new complaint also included class action allegations.

On April 8, 1996, the Defendants filed a motion to dismiss (Doc. 45) the second amended complaint as well as an answer and counterclaim (Doc. 46). The motion sought the dismissal of the Defendant Florida Progress from the action on three bases: (1) that Florida Progress is not an "employer" within the meaning of the ADEA or FCRA; (2) that Florida Progress cannot be liable under Section 510 of ERISA because it never employed any of the Plaintiffs; and (3) that the complaint fails to allege that the Plaintiffs exhausted their administrative remedies against Florida Progress. The issues raised by this motion remain ripe for decision.

The counterclaim, asserted by the Defendant Florida Power only, is lodged against five of the named Plaintiffs, each of whom executed a Career Transition Agreement and General Release prior to his separation from employment with Florida Power. The releases provided that, in exchange for monetary consideration, the counterclaim defendants agreed "not to sue or file any action and to fully release and discharge Florida Power and/or Florida Progress Corporation . . . from any and all claims, wages, causes of action, expenses, attorneys' fees, damages, judgments, and liabilities under applicable federal, state or local law. . . ." Ex. A to Florida Power's Motion for Summary Judgment on the Counterclaim (Doc. 53). The Defendant Florida Power thus alleges that these Plaintiffs are barred from bringing this lawsuit by the clear and unambiguous terms of the releases.

Florida Power had asserted this same counterclaim in its answer (Doc. 7) to the first amended complaint, and, on February 7, 1996, the Plaintiffs filed a motion for summary judgment (Doc. 30) on the counterclaim. On July 1, 1996, Florida Power filed a cross-motion for summary judgment (Doc. 53) on the counterclaim. Both motions await decision.

On August 5, 1996, the Plaintiffs' filed a motion (Doc. 57) seeking leave to file a third amended complaint (accompanied by a proposed complaint), which the Plaintiffs subsequently withdrew (Doc. 59) on August 13. On August 15, 1996, the Plaintiffs filed a motion (Doc. 60) for leave to file a fourth amended complaint (again accompanied by a proposed complaint), which the Plaintiffs again withdrew (Doc. 74) on October 2, 1996. Also on October 2, the Plaintiffs filed a motion (Doc. 75) for leave to file a fifth amended complaint (accompanied by yet another proposed complaint). The proposed fifth amended complaint sought to accomplish two ends: (1) the joinder of an additional thirty-nine former employees as plaintiffs; and (2) the withdrawal of the ERISA claims of the five plaintiffs who were the subject of Florida Power's counterclaim.

On October 16, 1996, while the motion for leave to amend was pending before the Magistrate Judge, the Court set this case for a status conference and hearing on all pending motions for October 29, 1996. At that status conference, the parties agreed to attempt an amicable resolution of the claims of all of the former employees and, toward this end, requested that the Court conditionally certify the case as a class action. Accordingly, on December 11, 1996, the Court entered an order (Doc. 84) certifying a class of plaintiffs under the ADEA and 29 U.S.C § 216(b). The order defined the class as all former employees of Florida Power who were terminated from employment on or after July 1, 1993 as a part of the redeployment or career transition programs and who were forty years of age or older at the time of their respective terminations. The order established a procedure for providing notice to potential class members and permitting them to opt into the lawsuit. *See supra* n.3. The order did not purport to make a final ruling that the case would proceed to trial as a class action, but instead reserved that decision for a hearing to be held on the Defendants' motion at the conclusion of

discovery.[5] Finally, the order provided that ruling on all other pending motions would be reserved until the time for opting into the class expired.

On January 8, 1997, the Court, anticipating that the opt-in period would expire sometime prior to mid-April, scheduled a status conference for April 22, 1997. As of April 22, sixty-three former employees of Florida Power had opted into the class. When combined with the seventeen original Plaintiffs and the thirty-nine potential plaintiffs who were the subject of the Plaintiffs motion for leave to amend, only two of whom had opted in as class members, the *Adams* action involved one hundred and seventeen former employees.

At the status conference conducted on April 22, the parties represented to the Court that they wanted to mediate and/or arbitrate the case before any judicial resolution of the substantive issues was attempted. In accordance with the parties' expressed wishes, the Court entered an order (Doc. 152), on April 24, 1997, holding any further proceedings in abatement and deferring ruling on all motions pending the outcome of the parties settlement efforts or the expiration of ninety days, whichever came first. On May 8, 1997, the Court entered an order (Doc. 153) referring this case to mediation.

On May 16, 1997, the Defendants filed a motion (Doc. 154) alleging that the parties' settlement efforts had failed and requesting that the Court conduct a status conference. The Court scheduled a status conference for June 27, 1997 which was, on the Plaintiffs' motion (Doc. 158), continued until July 17, 1997.

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[5] The December 11 order did not identify a specific procedural vehicle through which the propriety of class action status could be reached. However, the notice mailed to potential class members, and incorporated into the December 11 order, makes clear that the class would remain certified unless and until the Defendants filed (and the Court granted) a motion to decertify the class.

Meanwhile, on June 6, 1997, *Akin, et al. v. Florida Power Corporation, et al.*, 97-173-Civ-Oc-10C, was initiated with the filing of a complaint (Doc. 1). The *Akin* plaintiffs (ninety-eight of them) are comprised of thirty-seven of the thirty-nine individuals sought to be joined in the *Adams* fifth amended complaint and sixty-one of the sixty-three individuals who had opted into the *Adams* plaintiff class. Each of the *Akin* plaintiffs asserts ADEA, FCRA and ERISA claims against Florida Power and Florida Progress arising out of their separation from employment. All counsel of record in *Akin* are also counsel of record in *Adams*. In short, the *Akin* lawsuit is a carbon copy of the *Adams* action minus the seventeen original *Adams* plaintiffs.

On July 14, 1997, the Defendants filed a motion to dismiss (Doc. 6) the *Akin* complaint arguing that judicial economy requires dismissal because the *Adams* case embraces the same issues on a class-wide basis. Florida Progress also argues, as it does in *Adams*, that it should be dismissed because it never "employed" any of the Plaintiffs.

The Court conducted the previously scheduled status conference in the *Adams* case on July 17, 1997. The parties represented to the Court that their attempts at alternative dispute resolution had failed. Accordingly, on July 18, 1997, the Court entered an order (Doc. 161) vacating the April 24 order of abatement, reviving all pending motions and directing the parties to confer and file a case management report within thirty days.

On July 31, 1997, the *Akin* plaintiffs filed a motion to consolidate (Doc. 12) their case with *Adams* pursuant to FED. R. CIV. P. 42(a) claiming that the substantial similarity between the two actions warrants their concurrent prosecution and consideration.

In view of the revival of the pending motions in *Adams*, on August 13, 1997 the Magistrate Judge, concluding that the

Plaintiffs' motion did not adequately explain the need for further amendment, entered an order (Doc. 164) denying the Plaintiffs' motion for leave to file a fifth amended complaint without prejudice to the filing of a properly supported motion seeking such relief.

On August 26, 1997, the Defendants filed a motion for summary judgment (Doc. 167) on the ADEA claims of four of the *Adams* plaintiffs. The Defendants argue that these claims are barred by the respective plaintiffs' failure to commence a civil action within ninety days of receiving a right to sue letter from the Equal Employment Opportunity Commission ("EEOC"). *See* 29 U.S.C. § 626(e). The Plaintiffs have responded to the motion and it remains for consideration.

On August 28, 1997, the *Adams* plaintiffs filed a motion for leave to file a sixth amended complaint accompanied by another proposed amended complaint. In this motion, the *Adams* plaintiffs sought the joinder, as named plaintiffs, of the thirty-nine individuals from the proposed fifth amended complaint *and* sixty-one of the sixty-three individuals who had opted into the class. The proposed sixth amended complaint also deleted the ERISA claims of the five counterclaim defendants. On November 21, 1997, the Magistrate Judge entered an order (Doc. 194) granting the motion with respect to the thirty-nine plaintiffs involved in the earlier motion, but denying the motion with respect to the sixty-one opt-in class members. The order gave the Plaintiffs ten days in which to file an amended complaint effectuating the Magistrate Judge's decision, but no such pleading was ever filed.

As previously noted, the December 11 certification order left open the possibility that the class could, on the Defendants' motion, be decertified. *See supra* n.7 and accompanying text. The Defendants have not filed any motion seeking decertification, however, and the *Adams* case presently proceeds as a class action.

The Court conducted a status conference in both *Akin* and *Adams* on May 13, 1998. After that conference, the Court, on May 20, 1998, entered an order (Doc. 210) directing the parties to file their respective discovery plans and to suggest how common issues of fact and law in *Adams* and *Akin* might be grouped for efficient resolution. The parties have made their respective submissions.

DISCUSSION

These cases, in their current posture, present two sets of issues requiring discussion. First, the Court must determine how the relationship between *Akin* and *Adams* effects the future course of each of those cases—an inquiry which requires disposition of the Defendants' motion to dismiss *Akin* and the Plaintiffs' motion to consolidate *Akin* and *Adams*. Second, the Court must decide the substantive issues raised by the pending motions in *Adams*.

A. Relationship Between Akin and Adams

1. The Procedural Posture of *Adams*

The *Adams* plaintiffs did not file a sixth amended complaint within the time provided by the Magistriate Judge's November 11 order. When asked about the status of the issue pleadings at the May 13 status conference, counsel for the Plaintiffs represented that he believed that the *submission* of a proposed complaint with the motion for leave to amend sufficed as the *filing* of such a document. The filing of an additional lengthy complaint conforming to the requirements of the Magistrate Judge's order, counsel thought, would serve only to further thicken an already voluminous file.

While the Plaintiffs clearly did not comply with the order of the Magistrate Judge, the parties have since litigated the action as though the authorized amendments had been made. Moreover, the Court is convinced that the joinder of the additional plaintiffs facilitates the expedient resolution of both

the *Akin* and *Adams* cases. *See infra* pp.11a-13a. Accordingly, the Court will direct that the Plaintiffs' proposed sixth amended complaint be filed *nunc pro tunc* to the date of the Magistrate Judge's order granting leave to amend.[6] The Court will remove from its consideration of that document the individual claims of the sixty-one former employees who opted into the plaintiff class and as to whom the Magistrate Judge denied leave to amend.[7]

2. The Motions to Dismiss *Akin* and to Consolidate *Akin* and *Adams*

The *Akin* plaintiffs consist of the thirty-nine plaintiffs added by the sixth amended *Adams* complaint and sixty-one of the sixty-three opt-in *Adams* class members (the two additional class members having become named plaintiffs in the sixth amended complaint); thus, there is no *Akin* plaintiff who is not now represented—either as a named plaintiff or a class member—in the *Adams* case. Assuming that the *Adams* class

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[6] As illustrated here, the substitution of counsel's own judgment for compliance with the literal terms of a court order will, at best, result in unnecessary confusion and wasted judicial labor. The Court admonishes counsel to avoid doing so in the future.

[7] Thus, the sixth amended complaint, as modified by this order, asserts the individual or representative claims of the following former employees: Wanda Adams, James Akin, Linda Baldwin, Philip Bassa, Larry Bayes, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Richard L. Boreman, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Lorin Bryan, Robert Bunch, Thomas Catlett, Jr., Earl Doby, Samuel Dupuy, Paul Fintak, Leo Floyd, Gregg Frangipane, Jack Fremgen, John Gallagher, Mickey Gauldin, Polly Gillespie, Ralph Graves, Thomas Hays, Gopal Hedge, David Hodgson, Wiliam E. Hoover, Douglas Janowski, William Kenefik, Kermit Lassiter, Gloria Maxwell, Richard Merriman, James Moock, Michael Moore, Thomas Neaman, Jr., William Passmore, James M. Pennington, Marcia Quinn, David Reed, Joe Ried, Randy Seifert, Jiri Skala, James C. Smith, Janet Smith, William A. Smith, G. Allen Suban, William Sullivan, Steve Twitty, Charles Wagoner, Wendy Wheeler, Carl Williams and Barry Wood.

remains certified, the claims of all of the *Akin* and *Adams* plaintiffs are susceptible of resolution in a single case.

The Defendants argue, in their motion to dismiss (Doc. 6), that the Court should exercise its discretion and dismiss the *Akin* complaint because *Adams* was filed first. *See West Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) (holding that a court may, in its discretion, and in order to avoid duplicative labor and interference with the authority of another court, dismiss a lawsuit when the issues are presented in an action previously filed in another federal court). The authority cited by the Defendants is inapposite, however, because the two cases at issue here are not pending in different courts. Indeed, the cases are not only pending in the same court, but are also before the same judge. Thus, this is not a case in which the prosecution of the second action would impede a sister court's ability to decide a case; rather, the pendency of the two actions here implicates only the efficient administration of the Court's own docket.

Moreover, the dismissal of *Akin* seems particularly inappropriate because the issue of the continued certification of the *Adams* plaintiff class is not yet finally resolved. Should the Court order the dismissal of *Akin* and then, on the Defendants' motion, decertify the *Adams* plaintiff class, sixty-one plaintiffs—the *Adams* opt-ins who are also named plaintiffs in *Akin*—would go completely unrepresented in the present litigation. These Plaintiffs would likely seek further amendment of the *Adams* complaint or institute yet another separate legal action, needlessly increasing costs in time and efficiency for both the parties and the Court. The motion to dismiss should be denied.[8]

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[8] To the extent the motion to dismiss argues that Florida Progress Corporation is not liable on the merits of the Plaintiffs' claims, it is mooted by the Court's decision to abate *Akin* altogether.

Consolidation of *Akin* and *Adams*, although within the Court's discretion, is also inappropriate. *See Young v. City of Augusta, Ga.*, 59 F.3d 1160, 1168 (11th Cir. 1995) (holding that decision to consolidate under FED. R. CIV. P. 42(a) is committed to discretion of the district court). Unless the *Adams* class is decertified, all of the *Akin* plaintiffs will remain represented in that case. Consolidating *Akin* and *Adams* so that *Akin* may continue to be litigated as a separate action simply serves no purpose and would only increase the administrative burden involved in deciding the Plaintiffs' claims.

All of the Plaintiffs' claims are most efficiently resolved by simply abating *Akin* and directing that the file be closed. If *Adams* remains a class action, any further litigation of *Akin* will be unnecessary. If, on the other hand, the Defendants obtain decertification of the *Adams* class, the *Akin* plaintiffs may move to reopen the case and allow the claims of the Plaintiffs not represented in *Adams* to be decided. Because the resolution of the *Adams* class certification issue takes on increased importance to the timely resolution of these claims, the Defendants, if they intend to do so, should file a motion to decertify the *Adams* class within thirty days.

B. The Pending Motions in Adams

1. Florida Progress Corporation's Motion to Dismiss

Florida Progress has moved (Doc. 45) to dismiss the *Adams* complaint.[9] In support of dismissal, Florida Progress argues

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[9] The motion to dismiss was filed in response to the second amended complaint; however, the *nunc pro tunc* filing of the sixth amended complaint does not render the motion moot. In all relevant respects, the sixth amended complaint makes the same substantive allegations as the second amended complaint, and requiring the refiling of the motion to dismiss would serve only to delay the resolution of the substantive issues raised by the motion.

that all of the Plaintiffs were employed exclusively by Florida Power, its wholly owned subsidiary, and therefore that Florida Progress cannot be considered an "employer" under the ADEA or FCRA and cannot be held liable under Section 510 of ERISA. Florida Progress also contends, with respect to the ADEA and FCRA claims, that the Plaintiffs have failed to adequately allege that they have exhausted their administrative remedies against it. Finally, Florida Progress urges that the ERISA claims should be dismissed because the Plaintiffs have failed entirely to allege that they have exhausted the procedures for reviewing their claims under the subject employee benefit plans.

In passing on a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court is mindful that "[d]ismissal of a claim on the basis of barebones pleadings is a precarious disposition with a high mortality rate." *Int'l Erectors, Inc. v. Wilhoit Steel Erectors Rental Serv.*, 400 F.2d 465, 471 (5th Cir. 1978). A complaint need only give the Defendant and the Court fair notice of the claim being asserted and should not be dismissed unless it "appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 101-02, 2L.Ed. 2d 80 (1957). *See* also *Cook & Nichol, Inc. v. The Plimsoll Club*, 451 F.2d 505 (5th Cir. 1971). A complaint is sufficiently pleaded "if it shows that the Plaintiff is entitled to *any* relief that the Court can grant, regardless of whether it asks for the proper relief." *Dotschay v. Nat. Mut. Ins. Co.*, 246 F.2d 221, 222 (5th Cir. 1957).

a. the ADEA and FCRA claims

Florida Progress contends that it cannot be considered an "employer" within the meaning of the ADEA or FCRA, and that the Court thus lacks subject matter jurisdiction over these claims. *See* 29 U.S.C. §§ 623(a), 630(b); Fla. Stat. §§ 760.01(7), 760.10(1). Specifically, Florida Progress argues

that Florida Power alone hired, employed and discharged each of the Plaintiffs. In support of this claim, Florida Progress has submitted affidavits of several of the Defendants' executives tending to show that Florida Power, although wholly owned by Florida Progress, was legally distinct from Florida Progress and that it maintained exclusive control over its personnel policies.

The question of whether Florida Progress is an "employer" within the meaning of the statutes goes to the existence of jurisdiction over the subject matter of the Plaintiffs' claims. *See generally Sosa v. Airport Sys., Inc.*, 133 F.3d 1417 (11th Cir. 1998). The question also directly implicates the substantive merits of the Plaintiffs' claims; thus, a motion arguing that a defendant is not an "employer" should be decided under the standards applicable to Rule 12(b)(6) motions to dismiss or Rule 56 motions for summary judgment, as appropriate, and not the less stringent standard supplied by Rule 12(b)(1). *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1263-64 (11th Cir. 1997). As the discovery taken thus far has been very limited,[10] the Court is disinclined to treat Florida Progress' motion as a motion for summary judgment and consider its evidence and will evaluate the motion under the standard applicable to Rule 12(b)(6) motions to dismiss. *See* FED. R. CIV. P. 12(b); *Jones v. Auto Ins. Co. of Hartford, Conn.*, 917 F.2d 1528, 1531 (11th Cir. 1990) (holding that decision to treat motion to dismiss as motion for summary judgment rests in the discretion of the district court).

The sixth amended complaint alleges that "Florida Progress Corporation is the parent company of defendants [sic] Florida Power Corporation and has direct authority and managing

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[10] The Plaintiffs' proposed discovery plan (Doc. 212) reveals that they have not yet deposed any of the Defendants' executives or officers and that the Defendants have interposed objections to the bulk of the Plaintiffs' interrogatories and requests for production.

control over Florida Power Corporation." Sixth Amended Complaint at ¶ 13. While perhaps not as precise as it could be, the complaint is clearly sufficient to put Florida Progress on notice that the Plaintiffs claim that it and Florida Power should be treated as a single employer with respect to the decision to terminate the Plaintiffs' employment—i.e., that the Defendants' operations are so interrelated and centralized that they should be treated as a single entity. *See McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930, 933 (11th Cir. 1987); *Fike v. Gold Kist, Inc.*, 514 F. Supp. 722, 725-26 (N.D. Ala. 1981), *aff'd*, 664 F.2d 295 (11th Cir. 1981). While the evidence may ultimately support Florida Progress' claim that it is not an "employer," the allegations of the complaint are sufficient to survive the present motion to dismiss.

Florida Progress also argues that the Plaintiffs failed to name it as a respondent in any timely charge of discrimination filed with the EEOC and that they are thus barred from asserting their age discrimination claims under the ADEA and FCRA. *See* 29 U.S.C. § 626(e); Fla. Stat. § 760.11. Florida Progress concedes, however, that a defendant that was not named in a charge of discrimination may nonetheless be made a party to a subsequent civil action if the defendant named in the charge (in this case, Florida Power) and the unnamed defendant are sufficiently interrelated, or if the unnamed defendant was actually aware of the administrative proceedings. *See* Florida Progress' Memorandum in Support (Doc. 6) of Motion to Dismiss at 10-11. Given the Court's conclusion that the sixth amended complaint adequately alleges a "single employer" theory, the Court is also inclined to conclude that the complaint adequately pleads that the Defendants are so interrelated that filing a charge against Florida Power was, in effect, the same thing as filing a charge against Florida Progress. Moreover, these same allegations also permit the inference that Florida Progress was aware that charges of discrimination had been filed against Florida Power. The motion to dismiss, to the extent it applies to the

Plaintiffs' federal and state age discrimination claims, should be denied.

b. the ERISA claims

Florida Progress also argues that the complaint fails to allege that the Plaintiffs exhausted their administrative remedies under the employee benefit plans with which they claim the Defendants wrongfully interfered. Indeed, the sixth amended complaint alleges that "this claim is brought under Section 510 of ERISA, 29 U.S.C. § 1140, therefore, exhaustion of administrative remedies is not required." In response to the motion to dismiss, the Plaintiffs argue that ERISA's exhaustion requirement does not apply where, as here, the claimed violation is a violation of the statute as distinguished from the employee benefit plan. *See Amaro v. Cont'l Can Co.*, 724 F.2d 747, 752 (9th Cir. 1984); *Janowski v. Int'l Bhd. of Teamsters Local 710 Pension Fund*, 673 F.2d 931 (7th Cir. 1982), *vacated in part*, 433 U.S. 1222, 103 S. Ct. 2565, 77 L. Ed.2d 1406 (1983).

The Plaintiffs' position is directly contrary to the law of the Eleventh Circuit Court of Appeals which has held that an ERISA plaintiff must exhaust the administrative remedies created by an employee benefit plan, regardless of whether the claim is based on the plan or on the statute, prior to bringing a civil suit in federal court. *Mason v. Continental Group, Inc.*, 763 F.2d 1219, 1227 (11th Cir. 1985).[11] The Court, in its discretion, may decline to enforce the exhaustion requirement

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[11] The Court is troubled by the fact that *Mason*, which states the controlling law of this circuit and is directly adverse to the Plaintiffs' position, was decided some ten years prior to the filing of the Plaintiffs' memorandum in response to the motion to dismiss and is not so much as mentioned (much less discussed or distinguished) by the Plaintiffs. Perhaps more disturbing is the fact that *Mason* actually disapproves the approach taken by *Amaro*, a Ninth Circuit case cited as authority for the contrary proposition in the Plaintiffs' memorandum.

when the pursuit of administrative remedies would be futile or where the remedies themselves are inadequate. *Springer v. Wal-Mart Assoc. Group Health Plan*, 908 F.2d 897, 899 (11th Cir. 1990); *Curry v. Contract Fabricators Incorporated Profit Sharing Plan*, 891 F.2d 842, 846 (11th Cir. 1990). The Plaintiffs make no such allegations, however, and it would be an abuse of the Court's discretion to decline to enforce the exhaustion requirement for no reason at all. The motion to dismiss, insofar as it pertains to the ERISA claims, should be granted.[12]

2. The Cross-Motions for Summary Judgment on the Counterclaim

As previously discussed, five of the named Plaintiffs entered into Career Transition Agreements and General Releases with the Defendants, prior to their separation from employment, through which they waived their rights to pursue any legal claims flowing from their respective terminations in exchange for a contractually specified monetary sum. In its counterclaim, Florida Power seeks enforcement of the waiver of suit provisions of the agreements executed by the Plaintiffs Brannon, Catlett, Gauldin, Janowski and Pennington at the time of their respective terminations. Both the Plaintiffs and Florida Power have filed motions for summary judgment with respect to the counterclaim.[13] At issue in the motions is the

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[12] Because the Court has concluded that the ERISA claims should be dismissed for failure to exhaust administrative remedies, it need not, at present, consider Florida Progress' claim that it is not a proper Defendant to a proceeding under 29 U.S.C. § 1140.

[13] In view of the filing of the second amended complaint and second counterclaim, the Plaintiffs' motion for summary judgment had been terminated as moot from the Court's automated docketing system and is not presently listed as one of the motions pending in this case. As the second counterclaim is identical to its forerunner, requiring the filing of a second summary judgment motion would be an empty exercise in formality.

effect of the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626(f) (1994), on the enforceability of the releases.

The entry of summary judgment is appropriate only when the Court is satisfied that "there is no issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The Court must examine all of the evidence and draw all inferences in favor of the non-moving party. *Samples on Behalf of Samples v. Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988). Because the issue presented by the cross-motions involves questions of contract construction, matters of law for the Court's determination, that principle applies somewhat differently. Where the issue is to be ultimately resolved by the Court instead of a jury, the Court may resolve disputed issues of ultimate fact so long as the operative facts—i.e., those facts from which the ultimate fact of legal consequence is to be inferred—are undisputed. *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978).

The OWBPA requires that employee waivers of rights or claims under the ADEA be knowing and voluntary. 29 U.S.C. § 626(f)(1). The statute provides that waivers of rights and claims under the ADEA are not knowing and voluntary unless they comply with a number of explicit prerequisites.[14] 29 U.S.C. § 626(f)(1)(A)-(H). In adopting the OWBPA, the Congress elected to impose a set of specific and unqualified duties on employers seeking to obtain waivers of ADEA

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[14] The statutory list is not exclusive, however; waivers may be in compliance with the specific requirements of the OWBPA and nonetheless not be knowing and voluntary if, for instance, they are procured by fraud, duress or coercion, or if they are the product of a mutual mistake of fact. *Griffin v. Kraft Gen. Foods, Inc.*, 62 F.3d 368, 373-74 (11th Cir. 1995).

rights, and the statute is thus to be strictly construed. *See Oubre v. Entergy Operations. Inc.*,—U.S.—,118 S.Ct. 838, 841 (1998) ("The OWBPA implements Congress' policy via a strict, unqualified statutory stricture on waivers, and we are bound to take Congress at its word . . . Congress delineated these duties with precision and without qualification . . ."). A claim that a plaintiff has released his rights under the ADEA is an affirmative defense, and a defendant seeking to enforce such a release thus bears the burden of proving that the release complies with the provisions of the Act. *See* FED. R. CIV. P. 8(c); S.Rep. 101-263, at 35 (1990), *reprinted in* 1990 U.S.C.C.A.N. 1509, 1540.

The Plaintiffs argue, among other things, that the Career Transition Agreement and Release violates the statutory requirement that the employee be "advised in writing to consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(E). Florida Power counters that the following understanding, expressed in each of the subject Plaintiffs' agreements, is sufficient to satisfy the statute: "You agree that you have had an opportunity to carefully read and review this Agreement and discuss it with your advisor. . . ." Citing to Webster's New Universal Unabridged Dictionary, which defines an advisor as "one who gives advice; as, a legal advisor," Florida Power argues that the use of the term "advisor" in the release clearly contemplates a legal advisor or attorney and that the release thus comports with the OWBPA.

The Court is inclined to disagree. The release simply does not comply with the literal requirements of the statute, which mandates that the employee be *advised* to confer with an *attorney* prior to signing the agreement. Initially, the release at issue here does not advise, caution, or recommend that the Plaintiffs do anything; it merely expresses the understanding that the employee had the opportunity to speak to an advisor if he or she was inclined to do so. *American Airlines. Inc. v. Cardoza-Rodriguez*, 133 F.3d 111, 118 (1st Cir. 1998)

(holding that release stating that employee had "reasonable and sufficient time and opportunity to consult with an independent legal representative" prior to executing release did not constitute "advice" within the meaning of 29 U.S.C. § 626(f)(1)(E)).

Moreover, while the Defendant is correct that the term "advisor" might be understood to refer to one who gives legal advice, the term also clearly refers to a larger class of individuals who frequently "give advice," e.g., parents, friends or clergy. In requiring that employees considering waiving rights or claims under the ADEA be advised to consult with an attorney, Congress intended to give the employee the ability to "assess, *with the assistance of counsel,* the viability of a potential ADEA claim." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (6th Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 1033, 140 L. Ed.2d 201 (1998) (dicta) (*emphasis added*). *See also* S.Rep. 101-263, at 32, 34, *reprinted in,* 1990 U.S.C.C.A.N. 1509, 1538, 1540. In short, Congress appears to have contemplated that employees be advised to seek legal advice concerning the potential merits of an ADEA claim so that the employee can understand what he or she surrenders in releasing those claims. In view of this intention, the Court must conclude that Congress meant what it said when it chose the word "attorney" and that the release's reference to an "advisor" fails to satisfy the statute.

Construing the statute to accept the *post hoc* recitation that the employee had an opportunity to seek some form of advice prior to signing the release is inconsistent with the unambiguous language of the statute, and the Plaintiffs' motion for summary judgment, insofar as it pertains to the ADEA claims, should be granted).[15]

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[15] Florida Power has withdrawn its claim that the Plaintiffs should be required to "tender-back" the monetary consideration given in exchange for the release in light of *Oubre v. Entergy Operations. Inc.*, __U.S.__,

Florida Power is, however, entitled to summary judgment insofar as the releases apply to the Plaintiffs' claims under the FCRA.[16] The OWBPA does not apply to the FCRA, and the release clearly purports to bar claims asserted under that statute. The Plaintiffs make no argument to the contrary. Under Florida law, the Court must give the unambiguous language of the releases their operative effect and grant Florida Power's motion for summary judgment insofar as they pertain to the FCRA claims. *Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1164 (Fla. 1996). *See Neill v. Gulf Stream Coach, Inc.*, 966 F. Supp. 1149, 1151 & n.4 (M.D. Fla. 1997) (noting that the command of *Erie R.R. Co. v. Thompkins*, 301 U.S. 64, 58 S. Ct. 817, 82 L.Ed. 1188 (1938), applies to state law claim brought within federal court's jurisdiction by the presence of a federal claim in the action).

3. Florida Power's Motion for Partial Summary Judgment

On August 26, 1997, Florida Power moved for summary judgment on the ADEA claims of Linda Boyle, Tom Engers, Linda Maraget and James Owens arguing that those claims are barred by the Plaintiffs' failure to file suit within ninety days of receiving a notice of right to sue from the EEOC.[17] *See* 29 U.S.C. § 626(e). There is no dispute that each of these

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118 S.Ct. 838 , 139 L. Ed. 2d 849 (1998)

[16] The sixth amended complaint deleted these Plaintiffs' ERISA claims, and the parties' arguments with respect to those claims are therefore moot.

[17] Tom Engers, Linda Maraget and James Owens each opted into the *Adams* class and were thus parties to the action at the time the summary judgment motion was filed. Linda Boyle, however, was not joined in this action until the Court directed the filing of the sixth amended complaint. However, requiring the filing of an additional summary judgment motion would simply promote form over substance; the Plaintiffs and Florida Power litigated the motion as though Ms. Boyle was, in fact, a party.

individuals failed to file suit, seek joinder in this action or opt into the plaintiff class within ninety days of receiving their respective right to sue letters from the EEOC, and Florida Power would thus appear to have established a threshold entitlement to summary judgment. *See Armstrong v. Martin Marietta Corp.*, 138 F.3d 1374, 1392 (11th Cir. 1998) (holding that, in ADEA class action, statute of limitations tolls upon opting into putative class). The Plaintiffs argue, however, that the Court should excuse their failure to timely commence suit and allow them to "piggyback" on the timely filed claims of the representative plaintiffs.

The Plaintiffs' argument is devoid of merit. The so-called single-filing rule permits an ADEA claimant who failed to file a timely charge of discrimination with the EEOC (as distinguished from a timely filed civil action) to "piggyback" on the timely filed charge of one of the named plaintiffs in a subsequent class action lawsuit in certain circumstances. *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1101-1102 (11th Cir. 1996), *cert. denied solo nom.*, __ U.S. __, 177 S. Ct. 435, 136 L.Ed.2d 342 (1996). *See* 29 U.S.C. § 626(d) (requiring timely filing of charge of discrimination with EEOC). The rationale behind the rule is that the timely filing of a charge of discrimination that is representative of several other similar claims with the EEOC is sufficient to put the employer on notice of the complaint and thus to avoid the exclusion of "otherwise suitable plaintiffs from an ADEA class action simply because they have not performed the 'useless act of filing a charge.'" *Grayson*, 79 F.3d at 1103 (quoting LARSON, EMPLOYMENT DISCRIMINATION § 102.35(b) at 21-276.29—21-276.30)). The justification for a piggybacking rule disappears with the filing of a charge of discrimination with the EEOC, which triggers that body's investigatory and conciliatory procedures and thereby defines the scope of a potential plaintiff's complaint; thus, the Eleventh Circuit has held that the single-filing rule will not permit a plaintiff to avoid the ninety day statute of limitations by seeking to "piggyback" on

a timely filed lawsuit. *Gitlitz v. Compagnie Nationale Air France*. 129 F.3d 554, 558 (11th Cir. 1997).

The Plaintiffs' argument is clearly foreclosed by controlling precedent. As there is no dispute that the Plaintiffs either joined or opted into this action after the expiration of the ninety day limitations period, the Defendant is entitled to summary judgment.

Accordingly, upon due consideration, it is ORDERED that:

(1) with respect to *Akin, et al. v. Florida Power Corporation. et al.*, 97-173-Civ-Oc-10C:

(a) the Defendants' motion to dismiss the complaint (Doc. 6) is DENIED.

(b) The Plaintiffs' motion to consolidate (Doc. 12) is DENIED.

(c) This action is ABATED. The Clerk is directed to administratively close the file subject to the right of either party to move to reopen the action should the *Adams* class be decertified, or for other good cause shown.

(2) With respect to *Adams, et al. v. Florida Power Corporation, et al.*, 95-123a-Civ-Oc-10C:

(a) the Clerk is directed to file the Plaintiffs' proposed sixth amended complaint as the Plaintiffs' sixth amended complaint *nunc pro tunc* to November 21, 1997. The Court will not consider the individual or representative claims of the sixty-one individuals who opted into the conditionally certified class and as to whom the Magistrate Judge denied leave to amend, but will consider those claims only insofar as those individuals remain members of the Plaintiff class.

(b) Florida Progress Corporation's motion to dismiss (Doc. 45) is GRANTED IN PART and all of the ERISA claims alleged in the sixth amended complaint are DISMISSED without prejudice. The Plaintiffs shall have **ten**

(10) days from the date of this order in which to reallege their ERISA claims by filing an amendment to the sixth amended complaint; the filing of an entirely new complaint is not necessary. If the Plaintiffs decide to file such an amendment, they may only allege the ERISA claims dismissed by this order; no additional parties may be joined and no additional claims may be alleged. The Defendants shall move or answer any amendment filed by the Plaintiffs within **ten (10) days of service** with any such amendment. In all other respects, the motion to dismiss (Doc. 45) is DENIED.

(c) The Plaintiffs' motion for summary judgment (Doc. 30) on Florida Power Corporation's counterclaim is GRANTED IN PART and the Plaintiffs are entitled to judgment on the counterclaim with respect to the ADEA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington. The Clerk is directed to withhold the entry of judgment pending resolution of the case as a whole. FED. R. CIV. P. 54(b). In all other respects, the Plaintiffs' motion for summary judgment (Doc. 30) on the counterclaim is DENIED.

(d) Florida Power Corporation's motion for summary judgment (Doc. 53) on the counterclaim is GRANTED IN PART and Florida Power is entitled to judgment on the counterclaim with respect to the FCRA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington. The Clerk is directed to withhold the entry of judgment pending resolution of the case as a whole. FED. R. CIV. P. 54(b). In all other respects, the Florida Power Corporation's motion for summary judgment (Doc. 53) on the counterclaim is DENIED.

(e) Florida Power Corporation's motion for summary judgment (Doc. 167) on the ADEA claims of Linda Boyle, Tom Engers, Linda Maraget and James Owens is GRANTED. The Clerk is directed to withhold the entry of judgment

pending resolution of the case as a whole. FED. R. CIV. P. 54(b).

(f) For the reasons stated in the motion, and in the absence of any objection by the Defendants, the Plaintiffs' motion to sever (Doc. 197) the claim of Kermit Lassiter is GRANTED and Mr. Lassiter's claims will be tried separately from those of the other Plaintiffs.

(g) The parties' joint motion to appoint a Magistrate Judge (Doc. 204) is DENIED AS MOOT in view of the general order of reference which directs the assignment of discovery motions to the Magistrate Judge as a matter of course.

(h) The Defendants are directed to file any motion to decertify the class they deem necessary **within thirty (30) days of the date of this order**.

(i) The Clerk is directed to refer any future motions to amend the complaint, answer or counterclaim to the District Judge for decision.

DONE and ORDERED at Jacksonville, Florida, this 19th day of June, 1998.

/s/
UNITED STATES DISTRICT JUDGE

Copy to counsel of record
Copy to Hon. Howard T. Snyder

Supreme Court, U.S.
FILED
NOV 13 2001
CLERK

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

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I. THIS CASE PRESENTS AN OUTSTANDING VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

The court of appeals was quite clear in answering the certified "controlling issue of law in the case" (Pet. 2a): There is no such thing as an ADEA disparate impact cause of action within the Eleventh Circuit. The matter cannot be revisited by the district court because the district court cannot violate the mandate of the Eleventh Circuit. Thus, the disparate impact record will *not* further develop with the passage of time. The matter is as final as it's going to get.

Florida Power nonetheless argues that this case is not appropriate for the Court's review because the matter is, technically at least, interlocutory. Brief in Opp., pp. 5-8. In a memorandum joined by Chief Justice Rehnquist and Justice O'Connor, Justice White once aptly wrote:

> "Where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." This is such a case.[1]

This, too, is such a case.

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[1] *Randolph Cent. School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting) (quoting *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari); and citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734, n.2, (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 225 (6th ed. 1986)).

The petitioners agree with Florida Power that "[f]ollowing *Hazen Paper* [*Co. v. Biggins*, 507 U.S. 604 (1993)], three circuits—the Second, the Eighth, and the Ninth—have continued to recognize disparate impact claims under the ADEA." Brief in Opp., p. 10. Florida Power quibbles that the three circuits that recognize disparate impact liability under the ADEA have not "analyzed *anew* whether such claims are properly recognized" after *Hazen Paper*. Brief in Opp., p. 10 (emphasis added). The company concedes, however, that the circuits have "chosen" to follow their pre-*Hazen Paper* precedent. *Ibid*. There is no need for further analysis where a circuit court is not breaking from its established precedent, and the Second, the Eighth, and the Ninth Circuits have *elected* to adhere to their precedent. With the passing of the eight-year anniversary of *Hazen Paper*, it is clear that the circuit conflict is not going away on its own.

Since four circuits do not recognize disparate impact claims under the ADEA, a 4-3 conflict in the circuits on a controlling issue of federal discrimination law certainly indicates that the question presented is "important." *See* Pet., pp. 22-24. The question is also "clear-cut," since the Eleventh Circuit answered it absolutely. (Pet. 2a n.1). And there is no legitimate dispute whether the resolution of the question presented is fundamental to the further conduct of the case. The entire nature of a case involving 117 people has changed so that each must now proceed only with individual claims on the basis of disparate treatment.

Florida Power notes that the district court's ruling on the question presented arose in the context of a class decertification ruling and urges that the petitioners "may

be able to pursue their claims no matter what happens on the decertification motion." Brief in Opp., p. 8. Not so. The petitioners will *not* be able to pursue their disparate impact claims. Such claims have been excised not only from the case, but also from the entire Eleventh Circuit.[2]

Florida Power also suggests that the petitioners failed to *allege* disparate impact under the ADEA. Brief in Opp., 6. It is a bit disingenuous, however, for the company to argue simultaneously that there is no such thing as disparate impact *and* that the petitioners' did not adequately allege it. While the nature of disparate impact under the ADEA will not be known before the Court rules, the allegations in the complaint identified by Florida Power are certainly adequate to satisfy the standards for notice pleading.[3]

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[2] The fact that the issue arose on class certification is itself inconsequential to the Court's consideration of certiorari. The question presented is whether disparate impact is available under the ADEA. That question of law would have arisen in the district court at the summary judgment stage of the proceedings if it had not arisen during Florida Power's class decertification motion.

[3] The complaint alleges that the practice of the company's "reduction-in-force" had a "disproportionate impact on older employees." Sixth Amended Complaint ¶36. Florida Power cites *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.), for the proposition that the petitioners needed to identify an employment practice that adversely impacted older workers with heightened specificity. *Watson* was concerned with a party's prima facie evidentiary burden—not its burden of pleading. Ironically, *Watson* held that a disparate impact claim may indeed proceed based upon the fact that an employer committed employment decisions to the subjective discretion of supervisors—a circumstance that exists

Florida Power has not advanced a single argument that bears upon this Court's ability to resolve cogently through this case whether disparate impact is available under the ADEA. The petition should be granted so that the Court may resolve whether a plaintiff may assert an ADEA claim based upon disparate impact and, if so, under what conditions.

II. THE COURT OF APPEALS' RULING ON THE MERITS UNDERSCORES THE NEED FOR REVIEW

The petition briefly explains why the Eleventh Circuit's decision—that the ADEA does not permit disparate impact analysis under any circumstances—is erroneous. Pet., pp. 16-22. Florida Power, of course, argues that the decision is correct. Brief in Opp., pp. 12-14. The petition and the response reveal the parties' drastically different understanding of the law. If the Court grants review, there will be time enough to reply to Florida Power's arguments in detail. For present purposes, however, the depth of the parties' disagreement on the merits—which

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in this case. Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal, dated November 17, 1999 at 3-4 (on file with the Eleventh Circuit); Declaration of David L. Miller ¶¶24-30; Doc. 229-9 at pp. 9-12, 21-22.

mirrors the deep division among the circuit courts—only underscores the need for review.

Respectfully submitted,

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November 2001

(13)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

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**On Writ Of Certiorari To The
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JOINT APPENDIX
Volume I, Pages 1 to 191

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Petition for Certiorari Filed: October 3, 2001
Certiorari Granted: December 3, 2001

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TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries. 1

Order of Certification, December 11, 1996 7

Excerpts from Sixth Amended Complaint, August 27, 1997 17

Order on Pending Motions, June 19, 1998 . . . . . Brief in Opp. App. 1a

Exhibits A through I to Defendants' Motion to Decertify, August 7, 1998 30

Exhibits A through H to Plaintiffs' Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, September 30, 1998 . . . 108

VOLUME II

Exhibits I through S, and V to Plaintiffs' Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, September 30, 1998 192

Plaintiffs' Amended Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, October 7, 1998. 296

District Court Order on Pending Motions, August 26, 1999 . . . . . Pet. App. 19a

District Court Order Certifying Interlocutory Appeal, October 27, 1999 . . . . . Pet. App. 28a

Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal, November 17, 1999 318

TABLE OF CONTENTS – Continued

Page

Opinion of Court of Appeals, July 5, 2001 .. Pet. App. 1a

The Older American Worker, Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, June 1965 350

RELEVANT DOCKET ENTRIES

U.S. District Court
Middle District of Florida (Ocala)

Proceedings include all events.
5:95cv123 Adams, et al v. Florida Power Corp., et al.

			TRLSET
			HTS
12/11/96	84	ORDER GRANTING CLASS CERTIFICATION; granting [8-1] motion for class certification. The court conditionally certifies a class under the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621, et seq. The putative class is defined as former employees of Florida Power Corporation who were discharged during a reduction in force through its redeployment or career transition processes who were 40 years of age or older at that time, and whose termination occurred on or after 7/1/93 and through the date of the "Notice" (attached as Appendix A). "Consent to Join Action" is attached as Appendix B. The clerk shall send Appendices A & B to each person in the putative class. Defendant will submit a list of names and addresses of the putative class members to the clerk and plaintiffs' counsel. Plaintiffs' counsel will supply the clerk self-addressed postage paid envelopes containing the Notice and Consent. The clerk shall mail them by registered mail, requesting return receipt, for filing with the court. Parties will not initiate new discovery during the period for opting provided by the

Notice. An evidentiary hearing will be set at the conclusion of discovery, re: continuation of conditional class certification. Ruling on all other pending motions is reserved until after the opt period. A status conference will then be set, re: case management. (Signed by Judge Wm. T. Hodges) ctc (jsf)

* * *

6/22/98 215 ORDER, the clerk is directed to file the plaintiff's proposed 6th amended complaint as the plaintiff's 6th amended complaint nunc pro tunc to 11/21/97; granting in part, denying in part [45-1] motion to dismiss [42-1] 2nd amended complaint, all of the ERISA claims alleged in the 6th amended complaint are dismissed without prejudice, the plaintiffs shall have 10 days from the date of this order in which to reallege their ERISA claims by filing an amendment to the 6th amended complaint; defendants shall move or answer any amendment filed by the plaintiffs within 10 days of service with any such amendment; granting in part, denying in part [30-1] motion for summary judgment on defendants' counter-claim against the plaintiffs Catlett, Gaudlin, Janowski and Pennington, the plaintiff's are entitled to judgment on the counterclaim with respect to the ADEA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington; the clerk is

directed to withhold the entry of judgment pending resolution of the case as a whole; granting in part, denying in part [53-1] motion for summary judgment on its counterclaim; Florida Power is entitled to judgment on the counterclaim with respect to the FCRA claims of Joe Brannon, Thomas Catlett, Jr., Mickey Gauldin, Douglas Janowski and James Pennington; the clerk is directed to withhold the entry of judgment pending resolution of the case as a whole; granting [167-1] motion for summary judgment the time-barred ADEA claims of plaintiffs Boyle, Engers, Maraget, and Owens; the clerk is directed to withhold the entry of judgment pending resolution of the case as a whole; granting [197-1] motion to sever the claim of Kermit Lassiter and Mr. Lassiter's claims will be tried separately from those of the other plaintiff's; denying [204-1] joint motion to appoint magistrate to handle all discovery matters; the defendants are directed to file any motion to decertify the class they deem necessary within 30 days; the clerk is directed to refer any future motions to amend the complaint, answer or counterclaim to the District Judge for decision. (Signed by Wm. T. Hodges) ctc MFR Number 139/2312-2338 (acp)

6/22/98 216 SIXTH AMENDED COMPLAINT by Wanda L. Adams, Leo L. Floyd, Chester Wagoner, et al. amending [42-1] amended complaint; jury demand.

Answer Due 7/2/98 for Florida Power Corp. (acp) [Entry date 06/23/98]

* * *

8/19/98 221 MOTION by Florida Progress, Florida Power Corp. to decertify (the ADEA representative class); filed nunc pro tunc as of 8/10/98 per order #228. (acp) [Entry date 08/20/98] [Edit date 09/01/98]

* * *

8/19/98 223 SUPPLEMENT by Florida Power Corp., Florida Progress to motion to decertify (originally filed on 8/14/98) (acp) [Entry date 08/20/98] [Edit date 08/20/98]

* * *

8/28/98 226 SECOND SUPPLEMENT to [221-1] motion to to decertify by Florida Power Corp. (acp)

* * *

8/31/98 229 MEMORANDUM by Florida Power Corp., Florida Progress in support of [221-1] motion to decertify (the ADEA representative class), filed nunc pro tunc as of 8/10/98. (acp) [Entry date 09/01/98]

* * *

10/1/98 234 RESPONSE with memorandum of law by Wanda L. Adams, Leo L. Floyd, Chester Wagoner, et al., to [221-1] motion to decertify (the ADEA representative class) (with exhibits) (exhibits

filed separately in 2 folders) (mfk) [Entry date 10/02/98]

* * *

10/13/98 240 MOTION by Wanda L. Adams, et al. for leave to file amended response to defendants' motion to decertify referred to Magistrate Judge Howard T. Snyder (evs)

10/16/98 241 ORDER granting [240-1] motion for leave to file amended response to defendants' motion to decertify. The clerk is directed to file, plaintiffs' amended response to defendants' motion to decertify which was submitted with the motion. (Signed by Magistrate Judge Howard T. Snyder) ctc (evs)

10/16/98 242 AMENDED RESPONSE by Wanda L. Adams, et al to [226-1] motion to decertify (evs)

* * *

8/26/99 302 ORDER denying [263-1] amended motion to enforce settlement (amended) granting [238-1] motion for summary judgment granting [221-1] motion to decertify (the ADEA representative class); it is further ordered that the parties show cause, if any, by written memoranda to be filed with 20 days why the Court should not certify this Order to the USCA (Signed by Judge Wm. T. Hodges) ctc (mam)

* * *

United States Court of Appeals
11th Circuit – Atlanta

* * *

11/18/99	/ /	Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal

* * *

12/27/99	/ /	Probable Jurisdiction Noted

* * *

07/05/01	/ /	Opinion Issued
07/05/01	/ /	Judgment Entered

* * *

IN THE UNITED STATES DISTRICT COURT FOR
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.* Plaintiffs, v. FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION Defendants.	)	CIVIL ACTION NO.: 95-123-CIV-OC-10[A]

ORDER

(Filed Dec. 11, 1996)

This matter is before the Court on (1) Plaintiffs' Motion for Class Certification [Doc. 8], (2) and all other pending motions filed by Plaintiffs and Defendants. The Court, having read and considered Plaintiffs' Motion for Class Certification and Defendants' response thereto, and having considered the full record and all submissions and arguments of counsel, rules as follows.

1. *Plaintiffs' Motion for Class Certification*: The Court hereby conditionally certifies a class under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.* The putative class is defined as former employees of Florida Power Corporation who were discharged during a reduction in force through its redeployment or career transition processes who were 40 years of age or older at the time of such discharge and whose termination

occurred on or after July 1, 1993 and through the date of the Notice attached as Appendix A.

The clerk will send the "Notice", attached hereto as Appendix A, along with the "Consent to Join Action" attached hereto as Appendix B, to each person in the putative class.

The Defendant Florida Power will submit a list of the names and last known addresses of the putative class members to the Clerk and Plaintiffs' counsel. Plaintiffs' counsel will supply to the Clerk, for mailing, addressed, stamped envelopes containing the Notice and Consent to Join Action. The mailing shall be by Registered Mail, Return Receipt Requested. Return Receipts, as executed by the recipients, will be returned to the Clerk for filing as a part of the record in this case.

The parties will not initiate any new discovery during the opt in period provided by the Notice.

The Court will conduct an evidentiary hearing at the conclusion of discovery to determine whether this action will proceed as a class action pursuant to 29 U.S.C. § 216(b), which incorporates Section 16(b) of the Fair Labor Standards Act, or whether the conditional class certification should be vacated.

The Court's conditional certification of the class does not constitute any determination regarding the ultimate appropriateness of a class action; and/or the merits of the Complaint; the defenses alleged in the Answer; or the counterclaims asserted.

2. *All other pending motions*: The Court will reserve ruling on all other pending motions filed by the Plaintiffs

and Defendants until after the period for opting into the conditionally certified class has expired. A status conference will be scheduled by the Court after the opting in period has expired for purposes of entering a case management order to govern further proceedings in this case including discovery, motions for summary judgment, and trial.

This the 11th day of ~~November~~ [December], 1996.

/s/ W. Terrell Hodges
Judge William Terrell Hodges
United States District Court
Middle District of Florida

[c: Counsel of Record
Courtroom deputy]

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	CASE NO.
	)	
v.	)	95-123-CIV-OC-10
	)	
FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION	)	
	)	
Defendants.	)	

NOTICE

PLEASE READ THIS NOTICE CAREFULLY AND IN ITS ENTIRETY. YOUR LEGAL RIGHTS MAY BE AFFECTED. YOU HAVE BEEN SENT THIS NOTICE BECAUSE YOUR EMPLOYMENT WITH FLORIDA POWER CORPORATION WAS TERMINATED IN CONNECTION WITH THE REDEPLOYMENT OR CAREER TRANSITION PROCESS AND YOU WERE AT LEAST 40 YEARS OLD AT THAT TIME. THE FACT THAT YOU ARE RECEIVING THIS NOTICE DOES NOT MEAN THAT A DECISION HAS BEEN MADE THAT YOU WERE TERMINATED BY FLORIDA POWER CORPORATION BECAUSE OF YOUR AGE. THAT DECISION WILL BE MADE BY THE COURT AND/OR A JURY IN THE EVENT THAT YOU DECIDE TO BECOME A PARTY TO THIS LITIGATION AS DESCRIBED BELOW.

On July 5, 1995, the above titled case was originally filed in the Federal District Court, Middle District of Florida, Ocala Division, alleging that Florida Power Corporation and Florida Progress Corporation discriminated against Plaintiffs on the basis of their age, in violation of the Age Discrimination in Employment Act of 1967, as amended, (ADEA), 29 U.S.C. § 621 *et seq.* by terminating their employment in connection with the Redeployment and the Career Transition processes, during the time period from July 1, 1993 through the date of this notice. In this case, Plaintiffs seek back wages, damages, and attorney's fees arising out of their terminations.

Florida Power Corporation and Florida Progress Corporation deny that they discriminated against Plaintiffs on

the basis of age, in violation of the ADEA. Florida Power Corporation and Florida Progress Corporation contend that Plaintiffs' employment with Florida Power Corporation was legitimately terminated. In addition, Florida Power Corporation and Florida Progress Corporation contend that, as to those Plaintiffs who signed releases in connection with Career Transition Agreements and received severance payments, that those releases waived Plaintiffs' claims under the ADEA, and that therefore, those claims are forever barred.

As to those Plaintiffs terminated under the Career Transition process, Florida Power Corporation and Florida Progress Corporation have filed a counterclaim alleging that the filing of the claims in this suit constitutes a breach of the Career Transition Agreement, and are seeking to have the Court require those Plaintiffs to return the entire amount of severance payment before the Court will allow those Plaintiffs' claims to be heard. The counterclaim also seeks attorney's fees and other damages from the Plaintiffs.

The question of what relief Plaintiffs or Defendants may be entitled to, if any, will be determined by a judge or jury at the time of trial. This notice is for the sole purpose of determining the identity of those persons who wish to become parties in this case.

At the request of the Plaintiffs, the Court has conditionally certified a Class and is sending you this notice to inform you that you may join that class if you so desire. The fact that the Court has conditionally certified this class does not mean that the Court has decided one way or the other whether this case will ultimately proceed to

trial as a class action. At a later point in this action, Defendants will have the right to request the Court to decertify the conditional class in this action. Nor does this notice indicate one way or another the Court's views on the merits of the claims of any of the parties in the class.

IF YOU THINK THAT FLORIDA POWER CORPORATION OR FLORIDA PROGRESS CORPORATION HAS DISCRIMINATED AGAINST YOU ON THE BASIS OF YOUR AGE, YOU MAY JOIN THIS LAWSUIT AS A PARTY. IF YOU DECIDE TO JOIN THIS CASE BY FILING YOUR CONSENT, YOU WILL BE BOUND BY THE JUDGMENT OF THE COURT ON ALL ISSUES IN THIS CASE, WHETHER IT IS FAVORABLE OR UNFAVORABLE TO YOU AND YOU WILL BE BARRED FROM ASSERTING ANY OTHER CLAIMS AGAINST THE DEFENDANTS ARISING OUT OF YOUR EMPLOYMENT AND/OR THE TERMINATION OF EMPLOYMENT BY FLORIDA POWER CORPORATION OR FLORIDA PROGRESS CORPORATION.

If you wish to join this action, you must sign and return the enclosed "Consent to Join Action" before a Notary Public within 90 days of the date you receive this notice. Date and mail the original and three (3) copies of the signed Consent to Join Action to the **Clerk, United States District Court, Middle District of Florida, 311 W. Monroe Street, Room 110, P. O. Box 53558, Jacksonville, FL 32201**

If you become a party to this action and do not prevail on your claims, you will become liable for costs incurred by

Florida Power Corporation and Florida Progress Corporation. In addition, if you were terminated in connection with the Career Transition process, and signed a Career Transition Agreement, you may be required to return the entire amount of your severance payment prior to being permitted to prosecute your claim. In any event, the amount of your severance payment will be offset against any damages awarded to you.

As already stated, you are not required to join in this case by filing your consent or to take any action at all, unless you want to. It is completely voluntary. However, your determination whether or not to take action should be made promptly.

The attorney representing all named Plaintiffs except Mickey Gauldin is: Edward L. Scott, Esq., Scott & Gleason, P.A., 409 S.E. Fort King Street, Ocala, Florida 34471. Howard J. Shifke, Esq., 701 N. Franklin Street, Suite 200, Tampa, Florida 33602 represents Plaintiff Mickey Gauldin.

The attorneys representing the Defendants are: Sylvia H. Walbolt, Esq. and Marylin E. Culp, Esq., Carlton, Fields, Ward, Emmanuel, Smith & Cutler, One Harbour Place, Post Office Box 3239, Tampa, FI. 33601; J. Lewis Sapp, Esq. and Nancy F. Reynolds, Esq., Elarbee, Thompson & Trapnell, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, Georgia 30303; and Rodney E. Gaddy, Esq., Florida Power Corporation, 3201 34th Street South, P. O. Box 14042, St. Petersburg, Florida 33733.

The papers in this litigation may be inspected at the Office of the Clerk of Court, 311 W. Monroe Street, Room 110, Jacksonville, FL 32201.

PLEASE DO NOT CALL OR WRITE TO THE COURT, CLERK OF THE COURT, THE PARTIES OR COUNSEL FOR ANY OF THE PARTIES. IF YOU DECIDE TO OPT INTO THE CLASS BY RETURNING THE "CONSENT TO JOIN ACTION", IN THIS LAWSUIT, YOU WILL BE CONTACTED BY EDWARD L. SCOTT, ATTORNEY FOR THE PLAINTIFFS.

This notice is dated December (Month), 11 (Day) 1996.

/s/ Mary Frances Kennilly
[Deputy] Clerk, United States
District Court
Middle District of Florida

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.*	)	
	)	
Plaintiffs,	)	CIVIL ACTION NO.:
	)	
v.	)	95-123-CIV-OC-10
	)	
FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION	)	
	)	
	)	
Defendants.	)	

CONSENT TO JOIN ACTION

I have received and read the Notice mailed by the Clerk of Court regarding the conditional certification of a class in this lawsuit.

I wish to join this lawsuit as a party and have signed this notice in the presence of a notary public.

THIS NOTICE MUST BE RETURNED TO THE CLERK, UNITED STATES DISTRICT COURT, 311 W. MONROE STREET, ROOM 110, P.O. BOX 53558, JACKSONVILLE, FLORIDA 32201 WITHIN NINETY (90) DAYS OF YOUR RECEIPT OF THE NOTICE IF YOU WISH TO JOIN THE ACTION.

I signed this Notice on _____ (Month), _____ (Date) 199__.

_____
Signature

_____
Print Name

_____
Social Security Number

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me this _____ day of _____, 1996 by _____ (name). He/she [*please check as applicable*] | _____ | is personally known to me, or has produced | _____ | his/her _____ (state) driver's license, or | _____ | his/her

_____ [*type of identification*] as identification.

_____
Signature

_____
Printed Name

[*AFFIX NOTARIAL SEAL*]

NOTARY PUBLIC STATE OF FLORIDA

_____
Commission Expiration Date

_____
Serial Number, If Any

_____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, JAMES AKIN, LINDA BALDWIN, WILLIS BARNES, PHILIP BASSA, LARRY BAYES, PATSY BAYHARD, JAMES BECK, CHERYL BECKER, GARY BECKER, CYNTHIA BEHRENS-BOGA, EARL BETTIS, RICHARD L. BOREMAN, JEROLD A. BOYLE, LINDA BOYLE, GERALD BRANNEN, JOE N. BRANNON, DONALD BREDDEN, DONALD P. BROECKEL, RICHARD BROWN, LORIN BRYAN, ROBERT BUNCH, JUDITH A. CAREY, THOMAS CATLETT, JR., CHARLES COFFMAN, MARJORIE COPELAND, KENNETH CORBETT, EARL DOBY, SAMUEL DUPUY, TOM ENGERS, GWENDOLYN EVANS, PAUL FINTAK, LEO FLOYD, RAY FOREHAND, ELAINE BARNES-FOSTER, MARK FOSTER, GREGG FRANGIPANE, ROBERT FREELAND, JACK FREMGEN, VALERIE FRONZA, JOHN GALLAGHER, MICKEY GAULDIN, NARENDRA GARG, POLLY GILLESPIE, RALPH GRAVES, LINDA GROSECLOSE, MICHAEL HARMELING,

CASE NUMBER:
95-123-Civ-Oc-10A

THOMAS HAYS, EUGENE HAYWARD, GOPAL HEDGE, DAVID HODGSON, PETER HOLLIDAY, ROY C. HOOKS, WILLIAM E. HOOVER, DAYTON JACKSON, DOUGLAS JANOWSKI, CARRIE JONES, WILLIAM KENEFIK, STEPHEN KOON, GERALD LAMM, II, KERMIT LASSITER, SARA HAYMAN-SMITH, SARANAN LAUCK, THOMAS LIVINGSTON, JR., RAYMOND P. LONG, LINDA MARAGET, JOHN MASCOLL, BOB MASON, GLORIA MAXWELL, MARY MCCOY, CAROL MCFADDEN, ANNIE MCKINNEY, RICHARD MERRIMAN, JAMES MOOCK, MICHAEL MOORE, DAVID MORRIS, THOMAS NEMAN, JR., JAMES OWENS, WILLIAM PASSMORE, ADOLFO PAZ, JAMES M. PENNINGTON, MARK PETERSEN, ANDRE POULARD, TREVOR PUTNAM, MARCIA QUINN, DAVID REED, JOE REID, WILLIAM RICH, ALEXA RICHARDSON, TERRANCE RYAN, PATTI JO SCHMIDT (VITTE), LORENE SCOTT, TERRIE SCOTT, RANDY SEIFERT, JOHN SERBA, DARWIN SHIFLETT, JIRI SKALA, JAMES C. SMITH, JANET SMITH, WILLIAM A. SMITH, PATRICIA SOLKI, G. ALLEN SUBAN, WILLIAM SULLIVAN, STEVE TWITTY,

EDWARD URAL, ROBERT URBAN, JOSEPH B. VAUGHAN, DAVID VISSER, DANIEL WAGNER, CHESTER WAGONER, GARY WALDO, DIANNE WESTBROOK, WENDY WHEELER, CARL E. WILLIAMS, JR., DALE WILSON, BARRY WOOD, and GUY ZISSIMOPULOS.

Plaintiffs,

v.

FLORIDA POWER CORPORATION, and FLORIDA PROGRESS CORPORATION,

Defendants.

_____/

SIXTH AMENDED COMPLAINT
JURY TRIAL DEMANDED

COME NOW the plaintiffs, by and through their undersigned attorney, and sue the defendants, Florida Power Corporation and Florida Progress Corporation, and as grounds states as follows:

ALLEGATIONS COMMON TO ALL COUNTS

1. This is an action for injunctive relief and damages to redress deprivation of rights secured to the plaintiffs under the Age Discrimination and Employment Act of 1967, as amended, (ADEA) 29 U.S.C. § 621 et. seq. The plaintiffs also seek declaratory, injunctive, and equitable relief and attorneys fees and costs for the defendant's

wrongful interference with plaintiffs' pension rights in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1140. Jurisdiction is in this court pursuant to 29 U.S.C. § 621 et. seq., 29 U.S.C. § 1140 et. seq., and 28 U.S.C. § 1331 and 1337. Plaintiffs further invoke this court's pendant jurisdiction over their state law claims as set forth in counts XXXV through LI in this amended complaint.

2. This is a class action brought by the plaintiffs on their own behalf and on behalf of others similarly situated pursuant to the Fair Labor Standards Act, which governs civil actions under the ADEA, 29 U.S.C. § 216(b). The class represented by the plaintiffs consist of:

A) All persons who are at least age 40 who were terminated and/or discharged by the defendants in the defendants' redeployment program and/or career transition process in or about the fall of 1993 and continuing thereafter.

3. The plaintiffs have been informed and believe, and on such information and belief allege, that the class members number may be in excess of 380 and that joinder of all class members is impracticable. In the alternative, the plaintiffs request to proceed as multi plaintiffs in this single action.

4. The defendants' actions and threatened action as hereinafter alleged, are applicable to any and all members of the class.

5. The parties to this action have not engaged in any collusion in bringing this suit.

6. The plaintiffs have no interest antagonistic to other members of the class.

7. The plaintiffs can adequately represent the interest of other members of the class. Plaintiffs' claims are typical of claims of other members of the class, who are subject to the same deprivation of their rights by the defendants as hereinafter alleged.

8. There are questions of law and fact common to all members of the class.

9. The prosecution of separate actions by individual members of the class would be impractible [sic] because:

A) At the time of filing this complaint there are numerous other potential members who have shown a desire to become parties to this action and it is impractible [sic] for the plaintiffs to constantly have to amend their complaint to add new parties.

B) Inconsistent adjudications regarding individual members of the class would establish incompatible standards of conducts [sic] for the defendants, whose actions and threatened actions apply generally to any and all members of the class; and

C) Adjudications with respect to individual members of the class would be dispositive of the interest of other members not parties to the suit, since defendants' actions and threatened actions apply generally to any and all members to the class.

10. Questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and a class action is superior to

other available methods for the fair and efficient adjudication of the controversy, inasmuch as the individual members were deprived of essentially the same rights by the defendants' actions and threatened actions, and differ only in collateral aspects of their factual situation.

11. Venue is in this court pursuant to 28 U.S.C. § 1391 in that the defendants is [sic] doing business in this district, and the activity giving rise to the plaintiffs' claims took place in this district.

12. The defendants are business corporations organized and existing under the laws of the State of Florida and having their principle place of business located in St. Petersburg, Pinellas County, Florida. Defendants own, operate and maintain several places of business throughout Florida, including Marion and Citrus counties, where most of the plaintiffs were employed at the time of the alleged discriminatory conduct made the basis of this lawsuit.

13. The defendants [sic] Florida Progress Corporation is the parent company of defendants [sic] Florida Power Corporation and has direct authority and managing control over Florida Power Corporation. At all times throughout this complaint the defendants Florida Progress Corporation and Florida Power Corporation will be referred to collectively as "defendant."

14. At all times pertinent to this lawsuit, the defendant has been engaged in an industry affecting commerce within the meaning of Section 11(h) of the ADEA, 29 U.S.C. § 630(h).

15. The defendant is an "employer" within the meaning of Section 11(b) of the ADEA, 29 U.S.C. 21 630(b).

16. The defendant is an "employer" within the meaning of the Employment Retirement Income Security Act, (ERISA) 29 U.S.C. § 1140, who provided a pension plan within the meaning of ERISA as a benefit for its employees.

17. The plaintiffs, each and all of them, are citizens of the United States and of the state of Florida and had participated as an employee of defendant in the pension plan provided to defendants employees.

18. At all times pertinent to this lawsuit, the defendant knew or reasonably should have known that its employment decisions were subject to the provisions of the ADEA and *Fla. Stat.* § 760.10.

19. At all times pertinent to this lawsuit, the defendants knew or reasonably should have known that their employment decisions were subject to the provisions of ERISA.

20. The plaintiffs, each and all of them, have timely filed a charge of age discrimination with the Equal Employment Opportunity Commission and/or the Florida Commission on Human Relations complaining of the employment actions challenged in this amended complaint.

21. The initial complaint was filed within 90 days following the receipt of a "notice of right to sue" from the EEOC, or more than 60 days after the filing of the charge of discrimination with the EEOC by each of the plaintiffs,

respectively and/or some of the plaintiffs are members of a class of people over forty years of age and are eligible to become members of this class as the defendants have been put on notice that the ADEA has been violated in regards to a large class of individuals similarly situated.

22. In November, 1993, the defendant initiated what it referred to as a "redeployment" program. According to the defendant, this program was intended to prepare employees for separation from employment. The defendant announced plans to "streamline operations," and intended to eliminate up to 110 jobs at the nuclear plant in Crystal River, Florida, and several hundred more company wide.

23. During the same time period as the implementation of this "redeployment" program, the salary of Jack V. Critchfield, Chairman of Florida Progress Corporation, the parent company of Florida Power, was doubled to 1.3 million dollars. In addition, the defendant had just received a rate increase in monthly electricity rates approved by the Florida Public Service Commission.

24. Some time after the initiation of the redeployment program, the defendant began a program to eliminate its older, more senior employees. The defendant developed a policy of concentrating on the older, more senior employees who had a disability or were perceived as having a disability, or who were perceived as having a potentially high insurance claim and/or health problems treated through the defendant's health insurance fund. This program accomplished two objectives. First, it allowed the defendant to change its perceived image through the installation of a younger work force. Second,

it permitted the defendant to enjoy substantial savings through reduced compensation for the positions held by the more senior employees, and long term savings through reduced obligations for retirement and health benefits.

25. The plaintiffs, each and all of them, were over the age of 40 at the time of their discharge by the defendant. In addition, the plaintiffs, each and all of them, suffered from a disability and/or health problems treated through the defendants health insurance fund, or had a family member who had a disability and/or health problem treated through the defendant's health insurance fund.

26. The respective claims of the plaintiffs arise from a pattern and practice of intentional age discrimination by the defendant, and from a pattern and practice of intentional disregard for the rights and benefits of the plaintiffs under ERISA.

COUNT I
WANDA L. ADAMS – ADEA CLAIM

27. The plaintiff Wanda L. Adams realleges paragraphs 1 through 26 as though each were fully set forth herein.

28. Plaintiff Adams began her employment with defendant in early 1986. Plaintiff was discharged by defendant on or about December 14, 1993.

29. Plaintiff maintained solid job performance throughout her employment. During the course of the

plaintiff's employment with defendant, plaintiff's job performance was satisfactory or better.

30. The plaintiff was over 40 years of age at the time of her discharge, and younger employees with less seniority were not discharged and/or the plaintiff was replaced by a younger less qualified employee under 40 years of age.

31. Plaintiff's termination by defendant was motivated by the defendant's policy of willful age discrimination as outlined in this amended complaint.

32. Plaintiff was terminated because of her age in violation of the ADEA, 29 U.S.C. § 623(a)(1)(2).

33. The affect [sic] of the defendant's discriminatory practice has been to deprive the plaintiff of equal employment opportunities, wages, retirement, and other benefits, and equal treatment in the terms and conditions of her employment, thus resulting in damages to the plaintiff, which are continuing in nature.

34. The defendant's discriminatory acts complained of in this amended complaint are willful within the meaning of the ADEA, and the plaintiff is entitled to liquidated damages under 29 U.S.C. § 626(b).

35. The plaintiff has suffered, is now suffering and will continue to suffer injury from the defendants [sic] practices as described herein above.

36. The defendants' discriminatory acts complained of in this sixth amended complaint had a disproportionate impact on older employees in that the defendants' practice or policy regarding the defendants' reduction in force had a significant adverse effect on older employees.

The defendants had alternative means with a lesser discriminatory impact that could have equally well served the defendants' needs if the defendant was in fact going through a reduction in force. The defendants' reduction in force policy had a greater impact on members of the protected class than on employees under age 40.

37. The plaintiff's age was a motivating factor and made a difference in the decision to discharge the plaintiff, and defendants' violated the age discrimination and employment act and/or the Florida Civil Rights Act of 1992, with knowing and/or reckless disregard of that acts proscriptions.

WHEREFORE, the plaintiff demands the following relief:

A) That the court adjudicate and declare that the acts of the defendant complained of herein were discriminatory and violated the rights of the plaintiff under the ADEA;

B) That the court permanently enjoin the defendant, its officers, agents, successors, employees, attorneys, assigns and other representatives, and all those acting in concert with them or at their directoin, from engaging in an employment policy or practice that di:criminates against any plaintiff on the basis of age or from illegally retaliating against any plaintiff;

C) That the plaintiff recover appropriate back pay, including reimbursement for lost salary, bonuses, incentive compensation, pension, social security, and other benefits in amounts to be shown at trial;

D) That the plaintiff recover prejudgment interest on any award of back pay made by the jury as required by law;

E) That the plaintiff recover liquidated damages equal to her back pay as a result of defendant's willful violation of the ADEA;

F) That the court award plaintiff front pay through her projected date of regular retirement or, alternatively, that the court order defendant to reinstate the plaintiff to the position she held at the time of discharge, or its equivalent;

G) That the court award the plaintiff attorney's fees, costs and disbursement; and

H) That the court grant such additional relief as may be just.

* * *

DEMAND FOR JURY TRIAL

The plaintiffs, each and all of them, demand a jury trial on all issues claims to which they are so entitled.

DATED this 27th day of August, 1997.

Respectfully submitted.

/s/ Edward L. Scott
Edward L. Scott
Florida Bar Number: 648957
Edward L. Scott, P.A.
409 S.E. Fort King Street
Ocala, Florida 34471
Telephone No.: (352) 622-2264
Facsimile No.: (352) 622-9342
Attorney for Plaintiffs

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to NANCY F. REYNOLDS and J. LEWIS SAPP, ESQ., Elarbee, Thompson & Trapnell, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, GA 30303; RODNEY GADDY, ESQ., P.O. Box 14042, St. Petersburg, FL 14042; GARY SASSO, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Progress Plaza, Barnett Tower, Suite 2300, 200 Central Avenue, St. Petersburg, FL 33701-4352; HOWARD J. SHIFKE, 701 N. Franklin Street, Suite 200, Tampa, FL 33602 and to JOHN GALLAGHER, 1110 Birby Road, Knoxville, TN 37923 on this the 27 day of August, 1997.

/s/ Edward L. Scott
Edward L. Scott

Adams et al. v. Florida Power Corp. and Florida Progress Corp.,
Case No. 95-123-CIV-OC-10A
United States District Court for the
Middle District of Florida, Ocala Division

Exhibits A through I to
Defendants' Motion to Decertify

August 7, 1998

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al. Plaintiffs, v. FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION Defendants.	)	Case No. 95-123-CIV-OC-10

DECLARATION OF JOHN SCARDINO, JR.

COMES NOW, the undersigned, John Scardino, Jr., and, pursuant to 28 U.S.C. §1746, declares as follows:

1. My name is John Scardino, Jr. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action, and I give it freely for that purpose.

2. I have been employed by Florida Power Corporation since March of 1970. I currently hold the position of Vice President Controller for Florida Power and Florida Progress Corporation and have held this position since April, 1993. It is in these capacities that I am familiar with the facts set forth herein.

3. Florida Progress Corporation is a diversified holding company which owns all of the stock of Florida

Power. Florida Power is an electric utility whose service area encompasses approximately 20,000 square miles in thirty-two Florida counties.

4. During the years in question Florida Power staffed and maintained its General Office complex; between forty and fifty district or division offices, each in a different geographical location; a nuclear unit in Crystal River; seventeen fossil steam plants at six different locations; and forty-four peaking units at eleven different geographical sites. Florida Power not only operated and maintained generation plants but designed, operated, and maintained extensive transmission and distribution systems traversing its service territory.

5. In 1992, Florida Power's workforce consisted of about 5,800 union and non union employees, performing diverse services throughout the company's extensive service territory. Between 1992 and 1996, this workforce was reduced to about 4,600 employees.

6. The reduction in personnel resulted from a number of different factors, including reorganizations; the elimination of processes, departments and operations; plant closings; and restructurings. Each department formulated and implemented its own selection process for determining who would be affected.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 6 day of August, 1998.

/s/ John Scardino, Jr.
JOHN SCARDINO, JR.

EXHIBIT B

IN THE UNITED STATES DISTRICT COURT FOR
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al. Plaintiffs, v. FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION Defendants.	)	Case No. 95-123-CIV-OC-10

DECLARATION OF DOROTHY L. WERTZ

COMES NOW, the undersigned, Dorothy L. Wertz, and, pursuant to 28 U.S.C. §1746, declares as follows:

1. My name is Dorothy L. Wertz. I am over twenty-one (21) years of age and am competent to give this Affidavit. I give this Affidavit freely based on my personal knowledge and understand that it may be used in the above-referenced case.

2. I am currently employed by Florida Power Corporation (hereafter "Florida Power") in the position of Manager, Employee Relations and have held this position since May 1997. Prior to this time and since August of 1992, I held the positions of Principal Human Resources Representative and Senior Employee Relations Consultant.

3. In each of these positions, I have been and am custodian of certain of Florida Power's personnel records,

which are kept in the course of regularly conducted business activity pursuant to normal business practice at Florida Power Corporation.

4. In each of these positions, I have also had the responsibility for reviewing and researching records and responding to administrative charges of discrimination filed with the Florida Commission on Human Relations and the Equal Employment Opportunity Commission. In this capacity I am familiar with the administrative charges of discrimination, which were filed by some of the original plaintiffs, plaintiffs named in the Sixth Amended Complaint in the above-captioned lawsuit and opt-in plaintiffs.

5. True and correct copies of the charges received by Florida Power Corporation as to the plaintiffs in this case are attached hereto as Exhibit 1.

6. My review of those files under my custody and control reveal that three of the original plaintiffs resigned their employment from Florida Power Corporation, shortly after being placed in redeployment status. Specifically, Plaintiff Adams resigned her employment on January 4, 1994; Plaintiff Floyd resigned effective March 6, 1994; and Plaintiff Gallagher resigned on February 14, 1994.

7. My review of the files under my custody and control reveals that four original plaintiffs – Adams, Floyd, James Smith, and Williams – were placed into redeployment status from positions in Nuclear Operations, under Senior Vice President P.M. Beard. While the positions held by these plaintiffs fall under a common

organizational structure (Nuclear Operations), they are in different departments under different supervisors.

8. My review also shows that three original plaintiffs – Hodgson, William Smith and Suban – were placed into redeployment status from a different organizational division, Operations, which fell under Executive Vice President M.H. Phillips. While the positions held by these plaintiffs fall within the Operations division, they fall within two separate departments within that division. Further, each of these three plaintiffs reported to a different supervisor.

9. My review reveals that Wagoner is the only original plaintiff placed into redeployment status from a position in Energy Supply, under Senior Vice President J.A. Hancock. Finally, original plaintiffs Gallagher, Hoover, Janet Smith and Merriman were placed into redeployment status from the Corporate Services division, under Senior Vice President D.L. Miller. While the positions of Smith, Gallagher and Merriman fell within the same department, the Manager, Computer Services position held by Hoover was in a distinct department under different supervision.

10. From my review of the files, it is evident that each of the original plaintiffs held a different and distinct position with Florida Power Corporation. These positions ranged in classification from clerical (Adams' Nuclear Operations Training Specialist position) to supervisory (Floyd and Wagoner) and management (Hoover, Merriman, and Gauldin). Virtually every one of the positions held by the original plaintiffs involve distinct skills in

different disciplines, including employee training, engineering, purchasing, computer services, customer sales and marketing, nuclear regulatory compliance and licensing, contract administration, and distribution. These individuals were located throughout the State of Florida including numerous separate locations in and around St. Petersburg (Bartow plant, the General Office Complex and the 25th Street Operations Center), Crystal River, Haines City, and Perry.

11. My review of the files for original plaintiffs Brannon, Catlett, Gauldin, Janowski, and Pennington reveal that these employees were not placed into redeployment status. Each of these plaintiffs was offered a separation agreement in exchange for a lump sum severance payment.

12. My review of the EEOC charge files reveals different factual circumstances led to the separations of each original plaintiff's employment. In each of these cases the decision to abolish the position of the particular plaintiff was made by local supervisors or department management on an individual, decentralized basis. For example, Floyd was one of two Nuclear Document Control Supervisors; the other being Janet Anna. These employees' supervisor, Margaret Harmon, determined that one of these two positions could be cut. Based in large part on the fact that Anna had nine direct reports, versus Floyd's four, and had received higher scores on her most recent performance evaluations, Harmon selected Floyd's position for elimination.

Plaintiff Hodgson's position was abolished as the result of the Customer Sales and Marketing Department's consolidation of two geographic regions into one.

Plaintiff Janowski's Senior Human Resources Representative position was abolished in December of 1993, when his job function (training employees in Purchasing and Stores departmental procedures) was absorbed by the departmental employees themselves. At this time he bid back into a bargaining unit position within the department. He then failed to pass the test required for the position (which he grieved) and was reassigned as a program developer, responsible for power plant training. As his work experience was limited to purchasing and stores, he was unable to conduct the skills training and to critique the technical content of the power plant skills manual. When additional human resources positions were cut in 1995, he was offered a career transition package.

When Plaintiff Wagoner's supervisory position at the Bartow plant was abolished in 1992, Wagoner was assigned to special projects. In April of 1993, it was determined that no further projects would be assigned, and Wagoner was advised of his placement in redeployment status effective July 1, 1993.

Plaintiff James Smith's Nuclear Regulatory Specialist position was one of two such positions abolished when the Nuclear Compliance and Nuclear Licensing departments were consolidated. Ken Wilson, Manager of Nuclear Licensing, evaluated the seven incumbents and independently assessed incumbents pursuant to his criteria. Smith along with Reed Clarke received the lowest

scores on these evaluations, and each's position was abolished. Of the five Nuclear Regulatory Specialists who remained, all but one was in the protected age group and three are older than the employees selected for separation. I am also aware that Reed Clarke has pursued a private lawsuit alleging age discrimination arising out of this same employment action, which is in the latter stages of discovery.

Janet Smith's Investment Recovery Coordinator position was abolished, as the result of a departmental reconfiguration. Her responsibilities, which related to the disposition of obsolete goods, were absorbed by the persons responsible for the initial purchase of those goods. At the time her position was abolished and she was placed in redeployment status, Smith was not in the protected age group.

13. My review of the records under my custody and control shows that the original plaintiffs' separations resulted from the determinations of at least fourteen different decisionmakers and spanned a period of eighteen months.

14. In my capacity as Manager, Employee Relations, I have reviewed the personnel records of each of the 39 amendment plaintiffs named in Plaintiffs' Motion to File Fifth Amended Complaint and referenced in the attached Chart 1. Chart 1 has been designed to summarize the employees' history of employment with Florida Power and subsequent termination. A copy of that chart is attached as Exhibit 2.

15. My review of those files under my custody and control reveals: 34 different managers/decisionmakers

were involved in the termination decisions involving these 39 amendment plaintiffs; these 39 amendment plaintiffs occupied 36 different job classifications and worked at geographically diverse locations throughout the state, ranging from Perry to Crystal River, to Ocala and Wildwood, south to Clearwater and St. Petersburg; the decisions to terminate each of these 39 amendment plaintiffs occurred over a one-year and eight-month period, from May of 1994 through December of 1995; the position classifications and skills descriptions of these 39 individuals were also quite varied and their job titles ranged from Forms Designer to Technical Trainer, from Consumer Affairs Coordinator to Chief Operator of the Coal Plant, and from Programmer Analyst to Manager of Customer Accounts; and the salaries for these 39 individuals range from $19,700 to $86,790.

16. My review of those files under my custody and control also reveals that 26 of these 39 amendment plaintiffs signed Career Transition Agreements and received severance benefits. These benefits were generally based on the number of years of service which ranged from 4 years 9 months to 29 years 9 months. Similarly, the severance benefits paid these 26 individuals ranged from $5,682.75 to $98,473.36. In addition, it appears from Florida Power records that 12 of these amendment plaintiffs separated from Florida Power during the Redeployment process, not under the Career Transition process.

17. My review of those files under my custody and control also reveals that Lorin Bryan, one of the 39 amendment plaintiffs, was provided with a Career Transition package in lieu of termination for alleged acts of sexual harassment. Bryan worked as a Manager of Energy

Services for Florida Power from January 2, 1969 until June 15, 1994.

18. In my capacity as Manager, Employee Relations, I have also reviewed the personnel records of the 61 opt-in plaintiffs identified in Plaintiffs' Motion to File Sixth Amended Complaint and referenced in the attached Chart 2. Chart 2 has been designed to summarize the employees' history of employment with Florida Power and subsequent termination. A copy of that chart is attached as Exhibit 3.

19. My preliminary review of those files under my custody and control reveals: at least 40 different managers/decisionmakers were involved in the termination decisions involving these 61 individuals; these 61 opt-in plaintiffs occupied 45 different job classifications and worked at geographically diverse locations throughout the state, ranging from Monticello to Anclote, to Longwood and Lake Wales; the decisions to terminate each of these 61 individuals occurred over a 2-year and 7-month period, from January 1994 through July of 1996; the position classifications and skills descriptions of these 61 individuals were also quite varied and their job titles ranged from Director of Research and Development to Power Plant Clerk, from Environmental Regulatory Specialist to Press Operator I, and from Buyer in Fuels Supply to Customer Service Representative; and the annual salaries for these 61 individuals range from $16,664 to $93,600.

20. My review of those files under my custody and control also reveals that 45 of these 61 opt-in plaintiffs were offered Career Transition Agreements and severance

benefits. These benefits were generally based on the number of years of service which ranged from 2 years 2.5 months to 25 years 3.5 months. Similarly, the severance benefits paid these 45 individuals ranged from $5,918.60 to $73,800.00. In addition, it appears from Florida Power records that 16 of these opt-in plaintiffs separated from Florida Power during the Redeployment process, not under the Career Transition process.

21. My review of the files under my custody and control reveals that two of these 61 individuals – Owens and Holliday – were placed into redeployment status from positions in Nuclear Operations, under Senior Vice President P.M. Beard. While the positions held by these potential plaintiffs fall under a common organizational structure (Nuclear Operations), they are in different departments under different supervisors.

22. My review also shows that seven of these 61 individuals – McKinney, Westbrook, Bettis, Groseclose, Jackson, Maraget and Mason – were placed into redeployment status from a different organizational division, Operations, which fell under Executive Vice President M.H. Phillips. While the positions held by these opt-in plaintiffs fall within the Operations division, they fall within five separate departments within that division. Further, these individuals reported to different supervisors.

23. My review reveals that Vaughan, Ural and Koon were placed into redeployment status from positions in Energy Supply, under Senior Vice President J.A. Hancock. While the positions of Vaughan, Ural and Koon were in

Energy Supply, each position was in a distinct department under different supervision.

24. From the Human Resources Profiles and my review of the files, it is evident that virtually each of these 61 individuals held a different and distinct position with Florida Power Corporation. These positions range in classification from printing press operator (Jones' Press Operator I position) to supervisory (Willis Barnes) and management (Baynard). Virtually every one of the positions held by these opt-in plaintiffs involve distinct skills in different disciplines, including employee training, engineering, purchasing, computer services, customer sales and marketing, nuclear regulatory compliance and licensing, contract administration, and distribution. The 61 opt-in plaintiffs were located throughout the State of Florida including numerous separate locations in and around St. Petersburg (Bartow plant, the General Office Complex and the 25th Street Operations Center), Crystal River, Monticello, and Longwood.

25. My review of the files for opt-in plaintiffs Becker, Broeckel, Engers, Evans, Foster, Forehand, Hayward, Hooks, Jones, Livingston, Putnam, Richardson, Ryan, Visser, Wagner, Waldo and Wilson reveal that these employees were not placed into redeployment status. Each of these potential plaintiffs executed a separation agreement in exchange for a lump sum severance payment.

26. My review of those files under my custody and control also reveals a number of the 61 opt-in plaintiffs, including Marjorie Copeland and Judith Carey, were not terminated from the Company because of a reduction in

the workforce. Ms. Copeland voluntarily retired from her position as a Customer Service Assistant with 20 years 8 months of service. Ms. Copeland worked for Florida Power from December 3, 1973 until August 1, 1994. Ms. Copeland elected to take retirement even though her supervisor discouraged her from making such a choice. Ms. Copeland received a Career Transition package as a result of her voluntary retirement, not downsizing. Similarly, while a comparable position was available for Ms. Carey, she requested a Career Transition severance in order to pursue a career in the medical field.

27. My review of those files under my custody and control also reveals that Mark Peterson received a Career Transition severance package. However, Mr. Peterson was terminated from his position as a Program Analyst at Florida Power due to continued poor work performance rather than a reduction in workforce. His position was not abolished or consolidated. Mr. Peterson worked for Florida Power from June 17, 1991 until March 29, 1996.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 3rd day of August, 1998.

/s/ Dorothy L. Wertz
Dorothy L. Wertz

EXHIBIT NO. 2

FPC
TABLE OF INFORMATION
AMENDMENT PLAINTIFFS
WANDA ADAMS, et al. v. FLORIDA POWER CORPORATION
CASE NO. 95-123-CIV-OC-10

August 27, 1996

EMPLOYEE NAME/SOCIAL SECURITY NUMBER	SUPERVISOR INFO.	DATE OF BIRTH	DATE OF HIRE	DATE OF TERM.	LAST JOB CLASS. & LOCATION
Baldwin, Linda L. 262-86-7357	Marvin Pinkard Suncoast Florida Region Sup. Cust. Svcs. Admin. Largo	10-28-47	11-22-72	10-14-94	Energy Services Rep. Cust. Service & Marketing (Mid-Pinellas) Salary: $44,839
Bassa, Philip 477-46-3730	Robert Blume Supervisor Nuclear Special Training Crystal River	12-26-44	3-23-87	10-28-94	Nuclear Team Instructor Nuclear Operations Salary: $51,908
Bayes, Larry 234-88-3169	Wayne C. Forehand V.P. North Florida Region Ocala	4-20-53	11-26-79	4-1-95	Area Manager Perry District Salary: $76,651
Beck, James 378-44-4023	Nancy J. Smith Director Information Services St. Petersburg	12-20-43	6-15-81	5-1-94	Manager Information Systems Salary: $62,047
Becker, Cheryl R. 266-74-0603	Richard R. David Area Manager – North Pinellas Clearwater	7-17-44	6-9-69	9-28-94	Sup. District Office (Credit) Clearwater District Salary: $45,243
Behrens-Bogs, Cynthia 266-11-3993	Ray Yost Mgr. Quality Systems Nuclear Operations – Crystal River	6-3-54	5-21-73	9-1-95	Department Support Specialist Quality Systems – Nuclear Operations Salary: $28,480
Boreman, Richard 317-38-2552	Jon A. Simpson Mgr. Wildwood & North Florida Region Materials Services	1-24-40	9-12-61	2-1-95	Operations & Planning Administrator Wildwood & North Florida Region Materials Services Salary: $67,000
Boyle, Linda 002-38-8783	William Willits Mgr. Information Systems St. Petersburg	10-18-50	3-15-83	9-11-95	Systems Analyst Computer Data Center Operations Salary: $52,820
Brannen, Gerald 261-70-1469	Jon A. Simpson Mgr. Wildwood & North Florida Region Materials Services	8-25-45	6-22-70	10-28-94	Supervisor Central Repair Shop Wildwood & North FL Region Materials Services Salary: $63,000

EMPLOYEE NAME/SOCIAL SECURITY NUMBER	SUPERVISOR INFO.	DATE OF BIRTH	DATE OF HIRE	DATE OF TERM.	LAST JOB CLASS. & LOCATION
Breeden, Donald 172-32-7612	Edward D. Carnahan Mgr. Site Support – Crystal River Coal Plant	2-25-41	3-14-77	10-28-94	Supervisor, Maintenance Planning Crystal River Coal Plant Salary: $51,955
Bryan, Lorin 264-66-7892	Susan C. Postans Mgr. Customer Service & Marketing Ocala	6-27-43	1-2-69	6-15-94	Manager Energy Services Customer Services & Marketing Salary: $61,710
Bunch, Robert 261-82-2909	Walt Thurn Mgr. Technical Training St. Petersburg	2-14-47	4-6-70	12-8-95	Technical Trainer Technical Training Salary: $51,733
Doby, Earl 212-46-9819	Raul Roman Supervisor Operations & Planning Ocala	3-4-44	6-21-76	7-14-94	Engineering Assistant – Distribution Operations & Planning Salary: $38,823
Dupuy, Samuel A. (AJ) 418-58-5577	David Develle Director, Regulatory Accounting St. Petersburg	3-4-46	3-15-76	5-1-94	Manager, Plant Deprec. Acctg. Salary: $76,728
Fintak, Paul J. 397-42-4195	Bob South Senior Communications Coordinator Corporate Relations St. Petersburg	8-18-45	2-19-90	11-30-94	Forms Designer Employee Communications Service/Corp. Comm. Salary: $26,051
Frangipane, Greg 263-08-1391	Reed Adcock Manager, Energy Distribution Ocala	6-23-53	9-4-73	6-24-94	Sup. District Office Largo District Salary: $48,324
Fremgen, John J. 124-32-0579	George Oberndorfer Mgr. Procurement Quality Crystal River	10-15-42	5-13-87	8-19-94	Nuclear Quality Control Inspector Nuclear Operations Salary: $50,634
Graves, Ralph 265-62-8653	Luis Ordaz Mgr. Distribution Engineering Technology St. Petersburg	8-31-41	3-24-69	12-11-94	Distribution Analyses Engineer Distribution Operations Salary: $62,041
Hays, Thomas F. 414-70-4642	Walt Thurn Manager, Technical Training St. Petersburg	6-8-44	11-9-81	12-8-95	Technical Trainer Technical Training Dept. Salary: $55,518
Lassiter, W. Kermit 262-74-1306	Danny Douglas Plant Mgr. – Crystal River Coal Plant 1/2	10-27-45	2-18-71	N/A	Chief Operator Crystal River Coal Plant 1/2 Salary: $49,275

EMPLOYEE NAME/SOCIAL SECURITY NUMBER	SUPERVISOR INFO.	DATE OF BIRTH	DATE OF HIRE	DATE OF TERM.	LAST JOB CLASS. & LOCATION
Maxwell, Gloria F. 377-50-6267	Corey Sammartino – Sup. Consolidated Tax Services St. Petersburg	4-3-48	5-11-81	6-30-95	Tax Accounting Technician Tax Administration Salary: $30,500
Moock, James W. 198-28-9115	Jerry L. Sions Mgr. Nuclear Facility Services Crystal River	5-17-37	6-13-77	7-10-94	Nuclear Bldg. Services Supervisor Nuclear Operations Salary: $49,844
Neaman, Thomas J. 072-34-6101	Ray Yost Manager Quality Systems Crystal River – Nuclear Operations	3-20-43	12-2-85	10-28-94	Sr. Nuclear Quality Assurance Specialist Nuclear Operations Salary: $46,683
Passmore, William 254-52-4476	Mark Milat Nuclear Planning Coordinator Crystal River	5-27-38	12-11-84	10-28-94	Nuclear Parts & Materials Specialist Nuclear Operations Salary: $32,121
Quinn, Marcia 261-88-4515	Philip E. Dean Mgr. Consumer Affairs St. Petersburg	10-24-47	1-6-86	3-25-94	Consumer Affairs Coordinator Consumer Affairs Salary: $43,556
Reed, David 032-32-7048	Thomas L. Chamlee Supervisor Marketing & Development Clearwater	2-25-44	10-21-68	11-17-95	Senior Accounting Specialist Marketing & Development Salary: $54,000
Reid, Joe 085-36-1155	Leslie Creech Supervisor, Customer Service & Marketing Clearwater	8-3-46	9-22-80	7-17-94	Energy Services Specialist Customer Service & Marketing Salary: $46,224
Schmidt, Patti 293-32-0895	Chris Hicks Supervisor Materials Technology Crystal River	5-27-36	12-4-89	12-29-95	Engineering Technician Technical Services Salary: $35,784
Seifert, Randy A. 335-36-6679	James Mandakunis Manager, Distribution Construction & Operations St. Petersburg	11-29-43	2-5-73	10-28-94	Supervisor, Line Service Clearwater Line Salary: $65,177
Shiflett, R. Darwin 526-48-9611	Steve Purifoy Director, Accounting Services St. Petersburg	9-23-39	10-25-65	1/31/95	Manager, Customer Accounts Customer Accounting Salary: $86,790
Skala, Jiri (George) 282-56-8704	Bruce Taylor Supervisor Nuclear Engineering Crystal River	1-22-41	12-5-83	10-28-94	Nuclear Project Engineer Nuclear Operations Salary: $52,896

EMPLOYEE NAME/SOCIAL SECURITY NUMBER	SUPERVISOR INFO.	DATE OF BIRTH	DATE OF HIRE	DATE OF TERM.	LAST JOB CLASS. & LOCATION
Sullivan, William 261-62-0404	Jon A. Simpson Mgr. Wildwood & North Florida Region Materials Services	1-14-40	8-7-62	2-1-95	Materials Analyst II Wildwood & North FL Region Material Services Central Warehouse Salary: $51,600
Twitty, R. Steven 266-92-6742	David L. Miller Sr. V.P. Corporate Services St. Petersburg	1-29-50	9-18-72	9-1-95	Manager Information Systems Information Technology Salary: $81,813
Wheeler, Wendy 262-96-8434	Shelli H. Dunayer Mgr. Information Systems St. Petersburg	11-29-47	2-1-88	9-8-95	Programmer Analyst Information Systems Salary: $50,406
Wood, Barry 150-48-2662	Shelli H. Dunayer Mgr. Information Systems St. Petersburg	12-17-52	8-30-82	9-8-95	Systems Analyst Information Systems Salary: $58,823

EXHIBIT NO. 3

FPC
TABLE OF INFORMATION
OPT-IN PLAINTIFFS
WANDA ADAMS, et al. V. FLORIDA POWER CORPORATION, et al.
CASE NO. 95-123-CIV-OC-10

Employee Name & Social Security Number	Mgr/Supervisor Info.	Date of Birth	Date of Hire	Date of Term.	Last Job Classification, Location and Salary
WILLIS R. BARNES 317-44-7901 OPT IN	Bernie Cumbie Bartow Plant Mgr	02/02/44	09/03/80	12/29/95	Superintendent Maintenance Bartow Plant Salary: $79,000
ELAINE R. BARNES-FOSTER 262-82-5071 OPT IN	William Micklon Project Manager Competitive Intelligence	08/07/46	02/18/74	10/28/94	Energy Supply Cost Mgmt Performance Services Salary: $28,512
PATSY YEATES BAYNARD 431-88-8142 OPT IN	David Miller VP Corporate Services	05/29/48	08/11/75	11/17/95	Director Research & Development Salary: $93,600
GARY L. BECKER 393-54-7474 OPT IN	John Paetzold Suprv. Field Telecomm.	07/12/52	09/04/79	09/08/95	Enterprise Networking Systems Analyst Information Systems Salary: $53,055
EARL W. BETTIS 261-68-5586 OPT IN	Doug Ellerbe Suprv. Operations & Planning	12/11/43	01/25/73	05/22/94	Engineering Aide Operations & Planning Salary: $21,790
JEROLD A. BOYLE 266-64-9030 OPT IN	George Rickus VP HR	08/21/43	06/27/88	11/27/94	Director HR Development Salary: $91,800
DONALD P. BROECKEL 291-34-1321 OPT IN	Valerie Williams Mgr. Information Systems	09/25/39	04/18/85	09/08/95	Systems Analyst Information Systems Salary: $58,204
RICHARD H. BROWN 198-32-3470 OPT IN	Chris Hicks Supv. Materials Technology	01/09/42	08/25/86	10/28/94	NDE Specialist Salary: $40,000
JUDITH A. CAREY 230-76-7591 OPT IN	Keith Hulbert Mgr. Customer Service Administration	08/20/52	04/23/79	10/28/94	Supervisor, Customer Service Center Billing Central Fla. Region Salary: $44,218
CHARLES R. COFFMAN 218-62-8038 OPT IN	Tom Chamles Mgr. Sales/Mass Mkts.	08/06/52	12/18/72	11/17/95	Senior Account Specialist Salary: $53,521

Employee Name & Social Security Number	Mgr/Supervisor Info.	Date of Birth	Date of Hire	Date of Term.	Last Job Classification, Location and Salary
MARJORIE J. COPELAND 263-48-9190 OPT IN	David P. White District Mgr.	07/10/32	12/03/73	08/01/94	Customer Service Representative Salary: $22,906
KENNETH B. CORBETT 192-30-6496 OPT IN	Mark Sweet Mgr. Dist. Facilities Util.	02/30/39	07/30/80	12/09/94 CT 07/01/95 Retired	Joint Use Specialist Distribution Facilities Salary: $55,133
TOM D. ENGERS 099-24-1661 OPT IN	Richard Maier Mgr. Information Systems	06/19/37	11/25/85	09/08/95	Systems Analyst Information Services Salary: $58,316
GWENDOLYN J. EVANS 266-68-2794 OPT IN	Alan R. Craig Projected Mgr. HRIS	12/01/42	08/14/78	01/20/95	Human Resources Associate Benefits Cost Management Salary: $26,060
RAY E. FOREHAND 267-82-2525 OPT IN	Jim Crews Dir. Transmission Sub-station Design	05/11/45	10/30/72	07/22/95	Senior Relay Design Engineer Relay Design Salary: $58,827
MARK W. FOSTER 261-84-0950 OPT IN	John Gillman Dir. Materials & Contracts	07/16/50	06/03/80	10/07/94	Contract Administrator Materials & Contracts Salary: $53,000
ROBERT C. FREELAND 264-78-5974 OPT IN	Mitch Hull Dir. Software Dev. & Support	12/13/44	06/28/82	09/08/95	Programmer Analyst Information Systems Salary: $54,137
VALERIE PATRICIA FRONZA 205-58-8426 OPT IN	Vincent Dolan Dir. Business Devel.	02/24/40	06/20/79	01/31/95	Dept. Support Specialist Salary: $23,237
NARENDRA K. GARG 153-050-4333 OPT IN	Stephen Ulm Supv. Nuclear Plant Technical Support	03/01/41	10/10/88	10/28/94	Principal Nuclear Engineer Nuclear Operations Salary: $77,486
LINDA K. GROSECLOSE 376-54-1869 OPT IN	Sue Cleary Mgr. Sales/Mass Mkts.	07/26/48	10/19/70	07/17/94	Energy Services Specialist NSC Energy Services Salary: $49,365
MICHAEL JON HARMELING 263-82-1739 OPT IN	Darlena Redford Supv. Mkt. Retention & Operations	06/19/52	03/26/85	10/14/94	Energy Services Analyst Region Operations Salary: $41,300
EUGENE HAYWARD 264-68-9473 OPT IN	Charles Manning Mgr. E&O Distribution	09/08/47	06/15/81	10/14/94	Engineering Technician Jamestown Engineering Salary: $30,015

Employee Name & Social Security Number	Mgr/Supervisor Info.	Date of Birth	Date of Hire	Date of Term.	Last Job Classification, Location and Salary
PETER N. HOLLIDAY 264-84-7430 OPT IN	Brent Moore Mgr. Nuclear Scheduling	12/31/48	09/04/73	06/09/94	Nuclear Scheduling Coordinator Nuclear Operations Salary: $55,078
ROY C. HOOKS 264-70-1266 OPT IN	Bill Naylor Mgr. Energy Distribution	02/23/43	06/23/69	10/14/94	Line Foreman Salary: $54,917
L. DAYTON JACKSON 254-74-8035 OPT IN	David Bonk Dir. Mass. Mkts.	09/11/47	08/20/73	07/17/94	Business Representative Salary: $42,245
CARRIE T. GODDARD JONES 265-58-3492 OPT IN	Gary S. Jones Suprv. Printing Services	09/12/40	10/26/87	07/07/95	Press Operator I Printing Services Salary: $18,775
STEPHEN L. KOON 263-21-9069 OPT IN	Hank Dumas Plant Mgr.	07/23/52	07/30/73	01/21/94	Supervisor of Maintenance Planning Salary: $53,808
GERALD E. LAMM II 234-74-1158 OPT IN	Gene Christie Mgr. Nuclear Operations Materials Control	09/02/47	03/04/91	10/28/94	Buyer Nuclear Operations Salary: $44,100
SARANAN LAUCK 265-58-2553 OPT IN	Bonnie Bishoff Director Utility Partnerships	08/03/40	09/10/79	06/22/94	Regional Account Coordinator Pricing & Utility Partnerships Salary: $48,099
THOMAS M. LIVINGSTON 262-54-4651 OPT IN	Lori Craig Mgr. Distribution Operations	08/24/39	12/01/69	11/01/94 ?10/31?	Project Engineer Distribution Facilities Salary: $55,777
RAYMOND P. LONG 145-28-6241 OPT IN	Bill Willis Mgr. Systems Mgmt. Maintenance	08/31/36	09/26/83	09/08/95	Systems Analyst Salary: $58,899
LINDA A. MARAGET (MARTIN) 262-76-6147 OPT IN	Nancy Ritz Mgr. Customer Service Administration	05/06/45	07/13/87	05/02/94	Customer Service Rep. Salary: $16,664
JOHN O. MASCOLL 413-23-9226 OPT IN	Brian Gutherman Mgr. Nuclear Licensing	08/15/51	08/03/92	10/28/94	Nuclear Project Engineer Nuclear Operations Salary: $61,553

Employee Name & Social Security Number	Mgr/Supervisor Info.	Date of Birth	Date of Hire	Date of Term.	Last Job Classification, Location and Salary
ROBERT S. MASON, JR. 262-90-0333 OPT IN	Wally Barron VP Mkting/Pricing & DSM	01/23/47	03/24/69	06/15/94	Director Special Projects Salary: $89,016
MARY E. McCOY 267-74-0846 OPT IN	William C. Slusser, Jr. Mgr. Pricing	03/09/45	11/22/76	08/18/95	Pricing Tech Salary: $31,203
CAROL S. McFADDEN 205-34-0130 OPT IN	David Buell Plant Mgr.	07/07/44	01/31/83	11/10/95	Power Plant Clerk III Anclote Plant Salary: $25,378
ANNIE J. McKINNEY 416-72-8830 OPT IN	Bill Naylor Mgr. Energy Distribution	11/02/51	10/07/76	06/10/94	Operations Support Specialist Salary: $22,068
MICHAEL E. MOORE 510-50-8724 OPT IN	Mike Featham Mgr. Engineering & Construction	08/19/49	06/29/87	10/28/94	Senior Instrument Control Engineer Salary: $61,491
DAVID B. MORRIS 019-34-2679 OPT IN	Mike Featham Mgr. Engineering & Construction	04/25/46	08/12/91	10/28/94	Chemical Engineering Consultant, Energy Supply Plant Improvement Salary: $71,750
JAMES L. OWENS 264-90-3749 OPT IN	Carol N. Long Mgr. Nuclear Maint. Work Controls	09/25/46	05/13/68	07/06/94	Nuclear Specialist Nuclear Operations Salary: $58,023
ADOLFO J. PAZ 394-58-4541 OPT IN	Valerie Williams Mgr. Info. Systems	03/28/39	11/24/87	09/08/95	Systems Analyst Information Systems Salary: $56,901
MARK D. PETERSON 041-44-1669 OPT IN	Sue Dejarnette Systems Analyst Workstation Support Systems Management	01/18/51	06/17/91	03/27/96	Program Analyst Systems Management Salary: $51,612
ANDRE L. POULARD 073-50-2691 OPT IN	Don Stillwagon Principal T&D Engineer	11/29/48	06/26/78	10/14/94	Senior T&D Planning Engineer Salary: $59,592
TRAVERS DAN PUTNAM, JR. 262-90-2052 OPT IN	Norman Davis Dir. Fuel Supply	05/07/50	06/28/73	10/28/94	Buyer Fuels Supply Salary: $55,797
WILLIAM B. RICH 267-74-0280 OPT IN	James Schreiber Mgr. Motor Department	02/23/46	10/14/68	10/16/95	Manager, Metal Tech Services Salary: $62,170
ALEXA M. RICHARDSON 462-78-2345 OPT IN	Wayne Forehand VP N. FL Region	01/29/52	09/15/75	10/07/94	Area Manager Jasper District Salary: $68,264

Employee Name & Social Security Number	Mgr/Supervisor Info.	Date of Birth	Date of Hire	Date of Term.	Last Job Classification, Location and Salary
TERRANCE W. RYAN 291-50-2388 OPT IN	Robert Sarlous Mgr. Info Systems	07/07/51	10/31/83	09/08/95	Programmer Analyst Function Delivery Information Services Salary: $50,735
LORENE SCOTT 266-21-1309 OPT IN	Ann Gonzalez Superv. Billing	01/14/53	07/02/73	02/16/96	Customer Service Associate Business Office Salary: $26,151
TERRIE Y. SCOTT 261-82-4946 OPT IN	Pam League Dir. Employee Relations	03/14/47	08/13/73	06/16/95	Sr. Human Resources Assistant, Workforce Management Salary: $26,456
JOHN A. SERBA 221-32-5783 OPT IN	Mark Myers Mgr. Investor Relations	08/29/55	11/29/90	04/30/96	Sr. Investor Comm. Analyst Corporate Relations Salary: $61,360
SARAH J. (AMICK) SMITH-HAMAN 309-50-0708 OPT IN	Madelynn Talbert-Brown Mgr. Billing	08/08/47	03/25/74	02/15/94	Customer Service Rep. IV District Office Salary: $27,513
PATRICIA A. SOLKI 548-78-2704 OPT IN	Bob South Mgr. Employee Communication Services	02/28/49	05/19/86	10/21/94	Department Support Specialist Employee Comm. Salary: $23,542
EDWARD URAL 069-44-3788 OPT IN	James Mack Mgr. Production Outage Management	01/20/51	06/13/88	03/11/94	Internal Consultant Business Systems Salary: $70,560
ROBERT A. URBAN 375-48-9500 OPT IN	Mike Featham Mgr. Engineering & Construction	12/08/47	03/05/90	10/28/94	Principal Project Constructor Energy Supply Plant Improvements Salary: $64,200
JOSEPH B. VAUGHAN 262-54-4316 OPT IN	Leslie Creech Sup. Div. Energy Svcs	06/10/40	05/08/61	07/17/94	Energy Services Representative Salary: $47,300
DAVID L. VISSER 365-40-6470 OPT IN	Chris Hicks Suprv. Materials Technology	09/25/41	09/02/80	12/29/95	Sr. Materials Eng. Technical Svcs. Salary: $64,953
DANIEL J. WAGNER 190-36-6585 OPT IN	Fred Bonewell Dir. Safety & Material Svcs.	02/13/47	09/08/80	07/19/96	HR Assistant Safety & Medical Salary: $22,959
GARY E. WALDO 303-46-5104 OPT IN	James Cossey Superintendent Technical Svcs.	11/07/44	01/02/79	10/06/95	Environmental Regulator Specialist Salary: $59,126
DIANE K. WESTBROOK 235-68-7420 OPT IN	Susan Postans Mgr. Customer Service & Marketing	04/09/43	07/15/85 11/5/84 Adj. service date	07/10/94	Energy Services Support Specialist Salary: $22,820
DALE E. WILSON 445-42-6969 OPT IN	Darlene Radford Supv. Market Retin. & Oper.	03/05/44	03/02/81	10/14/94	Energy Management Coordinator Region Operations Salary: $55,500
GUY N. ZISSIMOPULOS 263-17-4128 OPT IN	Sue Cleary Mgr. Sales/Mass Markets	03/16/54	05/17/82	10/14/94	Energy Services Specialist, N. Pinellas-Pasco Region Salary: $48,556

EXHIBIT C

IN THE UNITED STATES DISTRICT COURT FOR
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al.	)	
Plaintiffs,	)	
v.	)	Case No.
FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION	)	95-123-CIV-OC-10
Defendants.	)	

DECLARATION OF DAVID L. MILLER

COMES NOW, the undersigned, David L. Miller, and, pursuant to 28 U.S.C. § 1746, declares as follows:

1. My name is David L. Miller. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action, and I give it freely for that purpose.

2. I was employed by Florida Power Corporation ("FPC") from March, 1967 until my retirement in April of 1998. From 1996 until my retirement, I held the position of Vice President, Corporate Services. During the period from 1990 to 1996, I held the position of Senior Vice President, Corporate Services. It is in these capacities that I am familiar with the facts set forth herein.

3. During the early 1990s, as a result of the approaching deregulation of the electric utility industry, Florida Power determined it could no longer do business in a vacuum as a regulated industry. The Company needed to implement cost-cutting efforts to survive in the changing environment.

4. In 1992, Allen Keesler, then President of Florida Power, directed his direct reports, including myself, to find ways to reduce the workforce without negatively affecting customer service and reliability. He communicated that FPC would have to do more with less. His stated goal was to have the same number of employees in January 1994 as were employed in January 1991.

5. Neither I nor the other Senior Vice Presidents believed that Keesler's numbers were realistic. As a result, we met as a People Achieving Corporate Excellence ("PACE") Team to gather operating statistics, goals and objectives. We intended to show these figures to Keesler and convince him that his numbers were unrealistic.

6. Nothing came of these meetings or Keesler's stated objective at this time. FPC instead began looking for ways to reduce costs, which were not people-driven, through the use of an outside consultant, Ernst & Young.

7. Ernst & Young was retained because, with the advent of the deregulation, Keesler believed it was important for FPC to look for a "change mechanism". Ernst & Young provided the concept of Business Process Improvement ("BPI") as one methodology to bring about

this change. FPC employees worked on teams with consultants from Ernst & Young to learn the BPI methodology.

8. I was involved with the BPI process in 1991 through 1992. In the initial stages of BPI, I and the other Senior Vice Presidents identified approximately 83 processes that were performed in operating the business at FPC. We then decided to conduct detailed BPI studies into improving the efficiencies of the largest 10 to 12 of these processes.

9. The Materials and Contracts Department under my supervision was among the first areas selected to undergo a BPI study.

10. The BPI process was intended to focus upon efficiencies rather than upon reductions in staff. Some of the BPI projects resulted in an increase in staffing; some resulted in no changes; other BPI projects resulted in staff reductions.

11. By way of example, I directed that a BPI study be undertaken in or around September of 1994 to determine if Materials and Contracts functions could be consolidated corporate-wide. At the time, the nuclear side of the organization and the non-nuclear side each had separate Materials and Contracts departments with separate staff. The BPI study performed indicated that consolidation could occur and would increase efficiencies. However, the results shown by this BPI study were not implemented.

12. As part of BPI, Ernst & Young suggested the concept of a redeployment process, which was intended

to help place employees whose positions were eliminated because of the efficiencies brought about by BPI. As adopted by FPC, redeployment was a tool whereby employees were continued on full salary and benefits for six months during which time they were provided assistance in locating other jobs both internal and external to FPC. It was anticipated that most redeployed employees would find other positions within FPC. Redeployment was thought to be the most fair and humane method to address the issue of reduced staffing.

13. During this same time frame, 1992-1993, various departments throughout FPC began looking at ways to cut costs due to the coming deregulation. Because the redeployment process was being implemented at a time when departments were cutting back throughout the Company, few employees were being placed in new positions.

14. As a result, FPC realized that it was building false expectations of redeployed employees finding other jobs within the Company. Based on this observation, in October 1994, the Company decided to, instead, offer displaced employees a severance or Career Transition package.

15. While various departments were individually deciding upon reorganizations, cutbacks, and the like, no standard method was utilized throughout FPC to determine which positions would be affected and/or eliminated or which employees would be separated. In the areas under my responsibility, I asked my directors or department heads to determine the means by which they

could reduce costs. I provided no instructions as to what methodology to use to accomplish the cost reductions.

16. During the time that FPC was being re-engineered in order to survive in the coming non-regulated environment, I had seven separate areas of responsibility: Environmental, Information Technology, Materials and Contracts (non-nuclear), Technology (Research and Development), Human Resources, Fleet, and Corporate Communications.

17. In 1993, a BPI study was conducted for the non-nuclear Materials and Contracts area. The study identified numerous processes where costs could be reduced, such as electronic payment of bills, the elimination of purchase orders and various other streamlined operations. That study was also a driving force in the reorganization of the Materials and Contracts area at this time. For example, as a result of that study management and supervisory positions were reduced from approximately 27 to 8.

18. I did not directly participate in preparing the BPI study performed in the Materials and Contracts area or in effectuating the ultimate results obtained. Nor was I involved in selecting positions for elimination, determining the new organizational structure, or determining which employees would be retained within that structure. As a result, I was not involved in the individual decisions which may have affected the Plaintiffs who, at this time, worked in the Materials and Contracts area.

19. Information Technology was one of my areas of responsibility from approximately July of 1993 through September of 1996. During the period from July of 1993

until mid 1995 my direct report in IT was a Director (Jim Pollard, Don Higgins in an interim capacity, then Terry Tyler), who in turn provided the day-to-day oversight of the department.

20. During the period Higgins was acting Director of IT, he approached me with a plan to combine positions so as to reduce overstaffing in IT management. I was not involved in this decision, except to approve Higgins' plan. I was not directly involved in any decisions to select employees nor did I participate in the selection of employees for separation at this time. I recall that Plaintiffs Beck and Kenefick, and possibly Hoover, were separated as a result of Higgins' recommendation and were placed in redeployment status.

21. When Tyler resigned the Director position in mid 1995, I determined not to refill that position, but to direct the IT area myself. When I undertook this role, I had two objectives in mind for IT. First, I wanted to determine if the IT staff had the proper skill sets to take FPC to the next level in a competitive environment. Second, I wanted to address complaints I had heard about IT's effectiveness and customer service.

22. Thus, the issues surrounding staffing in IT were not related to cost. Instead, they were driven by the need to address management concerns. The focus of cost reductions in IT was on non-employee areas, such as renegotiation of contracts with software licensees, finding ways to decrease network expenses, consolidating vendors, etc.

23. While I had a bias that IT was too large, I never discussed or suggested to anyone that IT be downsized.

Further, no one ever discussed with me, nor instructed me to downsize that area or to otherwise reduce the number of employees in IT.

24. At the time, FPC had a contract with Anderson Consulting to develop a new customer service system. I learned from an Anderson employee about a banding process, which that company used to evaluate its employees on an annual basis. I adopted that banding system to evaluate the skill sets of the IT staff.

25. The banding process consisted of a matrix whereby employees could be ranked from 1 to 5. This was the first and only occasion I used this banding process. To my knowledge this banding process was not and has not been used anywhere else at FPC.

26. I first used the banding to rank my direct reports at the time, the IT managers. As a result of this ranking, I personally made the decision to separate Plaintiff Steve Twitty, along with three other managers. Among the factors I considered were management ability; the ability to work with others within a team; technical ability; and the ability to work without supervision. The bases of my decisions included management weaknesses in the case of Twitty and negative feedback and lack of leading edge technological knowledge in the cases of the other managers. These employees were provided a severance package and executed Career Transition agreements.

27. I then instructed my remaining managers, including James Trent, William Willits, Sherry Massmann, Michael Puleo, Mitchell Hull, Terry Cardwell, and Howard Adams, to rank the employees under their supervision using the banding process. (IT at this time was

comprised of several departments with distinct disciplines/functions.) I at no time instructed my managers to cut any specific number of employees. To the contrary, in many cases, we discussed that specific positions would have to be refilled.

28. After the initial banding was performed, I instructed my managers to meet in a group and get input into each's rankings. In some cases employees had performed tasks across functional lines, and I wanted all managers, who had experience with employees, to provide input. When the final bandings were complete the managers were to meet with me and advise as to their individual decisions.

29. My role in this process was as an overseer to ensure consistency. I provided no input into how the individual rankings would come out and made no changes to those rankings when they were presented to me. In fact, I could not have done so, as I was not very familiar with the IT employees below my direct reports. As a result, I had no role in the decisions to separate any IT Plaintiffs, other than Steve Twitty, in this case. Instead, decisions as to individual employees were generally made by that employee's manager.

30. Not all of the IT employees involved in this case were separated as a result of this banding process. In addition to the managers placed in redeployment, I am aware that opt-in Mark Peterson was not separated as a result of banding. The decision to terminate Peterson was made by Sue DeJarnette, Team Lead Systems Analyst, some months later. DeJarnette terminated Peterson's employment for performance reasons; I approved her

decision. At the time of his separation, Peterson was given a Career Transition package.

31. While the Career Transition package was not originally intended for employees, like Peterson, who were terminated for performance or similar reasons, in practice many such employees received the package. Similarly, while poor performers were to be dealt with outside of the Redeployment process, many supervisors and managers placed their poor performers in Redeployment.

32. In late 1995, I decided to abolish the Research and Development ("R&D") department. Prior to my decision, FPC had withdrawn from the Electric Power Research Institute ("EPRI") to eliminate the 6 million dollar annual cost in dues and support. The vast majority of the work performed in R&D had been coordinated through EPRI.

33. When FPC withdrew from EPRI, we tried to replace this type of work with the R&D staff. The costs associated with this research and development work were then billed directly to individual business units at FPC. When the heads of these business units determined that they could not budget for research and development, it was my decision to eliminate the entire R&D department.

34. At the time the department was abolished, its director was opt-in Patsy Baynard. Although I looked for other areas within FPC to reassign Baynard, there were no positions available. As a result, FPC provided Baynard a Career Transition payment in excess of $73,000 and outplacement services at an additional cost of approximately $10,000.

35. During this same period of time, like the R&D department, the Print Shop was eliminated. I was not directly involved in the decision to eliminate this department, but approved that recommendation from George McWilliams, Manager, Facilities Management. It is my understanding that opt-in Carrie Goddard Jones was one of the employees separated as a result of McWilliams' decision to eliminate this department.

36. During the time I retained responsibility, neither the Environmental, Human Resources, nor Corporate Communications areas engaged in any workforce reductions. Cost-cutting in these areas was achieved at the time through other methods.

37. Neither I nor any member of my organization had any involvement with any separations, restructurings or reductions in any areas of Florida Power other than outlined above.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 6th day of August, 1998.

/s/ David L. Miller
David L. Miller

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.* Plaintiffs, v. FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION Defendants. FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION Defendants/Counterclaimants v. JOE N. BRANNON, THOMAS CATLETT, JR., MICKEY GAULDIN, DOUGLAS JANOWSKI, AND JAMES M. PENNINGTON, *et al.*, Counterclaim Defendants.	)	Case No. 95-123-CIV-0C-10

DECLARATION OF JANICE B. CASE

COMES NOW, the undersigned, Janice B. Case, and, pursuant to 28 U.S.C. §1746, declares as follows:

1. My name is Janice B. Case. I am competent to testify to, and have personal knowledge of the facts set forth in this Affidavit. I understand that this Affidavit is

for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I have been employed by Florida Power Corporation ("FPC") since August 1976. I currently hold the position of Senior Vice President, Energy Solutions. I previously held the position of Vice-President of the Suncoast Florida Region from November of 1990 until June of 1996.

3. In 1990, Florida Power was organized into seven (7) divisions, which created many layers of management and identical functions in each division. The projected costs of the employees to support this organization could not be supported in the five-year budget.

4. In 1991-92, FPC began to take a more serious and cost conscious approach to its Strategic Planning. The company knew that the industry was changing, and that the company would soon have to function in a competitive environment. I was on the core team of senior managers who worked on the Strategic Plan and developed cost reduction targets for the company. To develop these targets, we started with FPC's five-year forecast for income and expenses, and budgeted back from those numbers. By utilizing this process, we arrived at a yearly reduction goal that would have to be achieved in order for the budget to balance.

5. Beginning in 1990, there were three principal reorganizations in the Distribution Area. Each had different goals and means to accomplish those goals.

6. The first initiative was to reorganize the Company's customer service and distribution engineering and

operations functions from a divisional structure to a regional structure. FPC went from seven divisions to three regions: the Suncoast, the North, and the Central regions. During this initiative, downsizing was accomplished through offering employees the option to take voluntary early retirement.

7. The second initiative eliminated the "district" structure and offices within the regions, and moved the company towards centralized back office and marketing operations. Back office operations include functions such as billing, credit and meter reading. Marketing operations include functions such as high bill complaints, customer contacts, and demand-side management programs. These operations, previously performed in over forty district offices, were now accomplished in centralized regional offices instead. During this initiative, downsizing was accomplished through offering employees the option to take early retirement (where applicable) or position elimination. The severance tool available to employees who were not eligible for early retirement at this time was the redeployment process.

8. The third major restructuring initiative involved the engineering and operation functions. Prior to the initiative, there were 15 to 20 self-contained, self-managed field centers. The number of field centers was reduced to around 9, with the number of major field centers (from a management perspective) in my area dropping from 4 centers to only 2. At the time of this initiative, severance was provided to employees as career transition packages.

9. In 1990, during the first initiative, I worked with Senior Vice-President Maurice Phillips to develop a new organizational structure for the Suncoast Florida Region. We began the process by determining our objectives including providing good customer service, lowering costs, organizing more effectively, and renewing all franchises.

10. Next, we analyzed different organizational models that we had encountered through competitive research and through the Strategic Planning process to determine which organizational model best met our objectives.

11. Then we ranked our top performing managers and employees, and placed them into positions within the new structure. After placing our top performers, we analyzed the personnel who remained to determine whether we could offer them an early retirement, another position within the company, or, as a last resort, whether we would have to terminate their employment with FPC. No Plaintiffs were separated as a result of this initiative.

12. During the next second and third initiatives, I formed teams in my area of responsibility to handle the reorganization of specific business areas, such as back office operations, marketing, and meter reading. I assigned a team leader (Nancy Ritz in back office, David Bonk in Marketing, and Ed Horn in Meter Reading) and team members to each team. These teams identified the positions that would be required in the newly reorganized business area, and also identified the positions that would be eliminated.

13. After the teams determined the reorganized business structure, they worked to identify both the employees who would fill the newly-created positions and the employees who would be terminated as a result of the reorganization. The teams assembled past performance reviews, and also collected information from current supervisors. The reorganization teams also worked with a representative from Human Resources to ensure consistency in their selection process. Based upon the information gathered about the individual employees, the teams ranked all employees against a matrix of criteria or dimensions that were essential for the new positions. I was not directly involved in this process other than in oversight capacity. I provided no input into how the individual rankings would come out.

14. The reorganization and consolidation of functions resulted in the termination of employees. As an example, customer service and marketing was centralized in the region and employees were selected to fill positions in the new organization based on review of prior performance, current supervisory assessment and position knowledge, and the skill and ability requirements of the job. Evaluators for the marketing and customer service organization included David Bonk, Tom Chamlee, Dan Christopher, Sue Cleary, Leslie Creech, Phil Hill and Nancy Sanborn. Using the criteria set forth above, it was recommended that Plaintiffs Linda K. Groseclose, David Hodgson, L. Dayton Jackson, Joe Reid, William A. Smith and Joseph B. Vaughn be placed in redeployment and I approved their recommendation.

15. I have been provided a list of original Plaintiffs, amendment Plaintiffs, and opt-in Plaintiffs in the case of

Adams v. Florida Power Corporation. I am personally familiar with some of these Plaintiffs and the circumstances under which their employment with Florida Power was terminated. For example, Randy Seifert, who was employed as a Line Service Supervisor in Clearwater, was terminated effective October 28, 1994 and was provided with Career Transition benefits. Prior to being terminated, Mr. Seifert was given the opportunity to be reassigned to the position of Service Supervisor at no reduction in pay. However, Mr. Seifert turned down this opportunity and elected to take the severance benefits provided through Career Transition.

16. Greg Frangipane, who was employed as a Supervisor in the Largo District Office, was separated in January, 1994 and provided with Redeployment benefits. Mr. Frangipane's termination was recommended by a management team consisting of Ed Horn, Reed Adcock, Mike Lewis, and Michael Higgs. Mr. Frangipane's termination was occasioned by the centrali ation of the back office functions which had formerly been performed on a decentralized basis.

17. Linda Baldwin, who was employed in Marketing as an Energy Service Representative, was terminated effective October, 1994 and was provided with Career Transition benefits. Ms. Baldwin was terminated due to a reduction in the number of employees in the Customer Service and Marketing Department.

18. David Reed, who was employed as a Senior Accounting Specialist, was terminated effective November, 1995 and was provided with Career Transition benefits. Mr. Reed was terminated due to the fact that there

was not enough work available for a regular, full-time employee such as Mr. Reed. In fact, Mr. Reed acknowledged and admitted that there was not enough work to keep him busy.

19. In addition to these reorganization efforts, FPC cut costs in other ways, as well. For example, in some instances, we were forced to roll back salaries as we placed employees into the new positions, because the company was committed to holding salaries to no more than 120% of the market value for that position.

20. During the same time period, FPC also began a program to help managers deal more directly with poor performers.

22. Although the Business Process Improvement ("BPI") process was also being employed on different projects throughout the company at the same time as some of the downsizing initiatives, it was not a significant influence in reorganizing efforts in my area of responsibility. BPI studies were performed and provided background for the reorganization to a centralized back office, and changes in the engineering and operations area. However, the results of the BPI studies did not drive the reorganization.

23. I had no involvement with the Tim Martin study, which was performed from late spring through July 1993 for the Nuclear Operations Division. Nor did I have any involvement in any employee separations or reductions in the Central and North Florida Regions, Energy Delivery, Energy Supply or in any area of Florida Power other than the Suncoast Florida region.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 5 day of August, 1998.

/s/ Janice B. Case
JANICE B. CASE

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.* Plaintiffs, v. FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION Defendants. FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION Defendant/Counterclaimant v. JOE N. BRANNON, THOMAS CATLETT, JR., MICKEY GAULDIN, DOUGLAS JANOWSKI, AND JAMES M. PENNINGTON, *et al.*, Counterclaim Defendants.	Case No. 95-123-CIV-OC-10

DECLARATION OF PERCY MORRIS BEARD, JR.

COMES NOW, the undersigned, Percy Morris Beard, Jr., and, pursuant to 28 U.S.C. § 1746, declares as follows:

1. My name is Percy Morris Beard, Jr. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this

Declaration is for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I was employed by Florida Power Corporation ("FPC") in November 1989. I assumed the duties of the position of Senior Vice President, Nuclear Operations in January, 1990. I retired from active employment with FPC in 1997.

3. FPC operates and maintains production plants, offices, and transmission and distribution facilities in different locations in 32 counties in the State of Florida. One such operation is the Nuclear Operations Division ("NOD") of which I was Senior Vice President. The vast majority of individuals employed in NOD work at the nuclear plant in Crystal River, Florida which is known as CR3.

4. In October, 1992, Congress enacted the Energy Policy Act of 1992, which deregulated the wholesale electrical generation market. This legislation evidenced Congress' intent to deregulate the wholesale electrical generation industry and to move utilities such as Florida Power from regulated, cost-plus monopolies to non-regulated, competitive entities.

5. In the spring of 1993, I undertook an analysis of NOD staffing and labor costs as part of an overall examination of NOD's competitiveness. I and other NOD personnel contacted other nuclear facilities, particularly other single-unit nuclear utilities such as FPC, to acquire data as to staffing levels and costs. During this effort, my colleagues at other facilities recommended Tim Martin, a consultant highly regarded as knowledgeable in the area of nuclear staffing efficiencies. Thereafter, Martin was

hired as an independent consultant to conduct a study of FPC's NOD staffing and to provide a benchmark comparison with FPC's competitors.

6. Martin prepared a staffing analysis report which compared staffing at CR3 with comparable facilities.

7. During this time in 1992 and 1993, NOD had begun the process of eliminating vacant regular positions as well as its complement of full-time contractor personnel. In mid-1993, I met with my management team to discuss Martin's recommendations for further reducing areas of overstaffing within NOD. During these meetings, we did not select specific personnel for termination; rather, it was decided that individual employment decisions would be left to the discretion of the various department managers or supervisors, using the guidelines discussed below.

8. In connection with NOD downsizing, I issued guidelines (prepared at my direction by Larry Kelly who was Nuclear Training Director) which provided a general framework for use in evaluating and selecting personnel for layoff.[1] At my insistence, these guidelines were to be utilized to ensure that decisions pursuant to the downsizing process were made on the basis of performance alone, and that the selection process was otherwise nondiscriminatory.

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[1] A true and correct copy of those guidelines is attached hereto as Exhibit 1. True and correct copies of these guidelines as utilized by various supervisors in the actual selection of employees are attached hereto as Exhibit 2.

9. Neither I nor any member of my organization had any involvement in any terminations, reorganizations, plant closings, or reductions in any area of Florida Power other than the Nuclear Operations Department.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this the 1 day of August, 1998.

/s/ Percy Morris Beard, Jr.
PERCY MORRIS BEARD, JR.

EXHIBIT 1

10/93

GUIDELINES FOR EVALUATION AND SELECTION OF NUCLEAR OPERATIONS PERSONNEL

The purpose of these guidelines is to provide assistance to supervision in the selection of personnel for jobs affected by departmental downsizing. The primary objective is to assure that a fair process, meeting all legal standards, is consistently applied across Nuclear Operations.

To implement this process, the supervisor and his or her next level of management will review the appropriate EPQ, Job Description or Job Function Survey and determine the most important dimensions (approximately 5-10) to be successful in the job. The selection should also include any dimensions that would be needed in the future due to anticipated changes within the job scope.

The dimensions should then be weighed to reflect their importance to the candidate's success in the job. The weighing scale should be as follows:

3. critical to job performance;

2. very important to job performance;

1. important to job performance.

The supervisor should enter the dimensions and weighing factors on the Position Evaluation (Form 1). Both the supervisor and next level of management must reach consensus on the validity of both the dimensions and the weighing factors.

Based on the candidate's performance (from observations, performance evaluations, feedback, review of non-productive time, etc.) the supervisor and next level of management will evaluate each of the candidates for the position against the mutually agreed upon set of dimensions. The candidate's evaluation should be independent of any comparison to other candidates. A consensus rating will be agreed upon and entered in the appropriate box of the Position Evaluation (Form 1).

The supervisor will then complete his or her evaluation of the candidate's *current* performance and enter the rating along with any remarks he or she feels are appropriate.

Next, the supervisor will determine the candidate's average performance for the past 3 years and enter the results as indicated on Form 1.

The supervisor will total the score and discuss the results with the next level of management. When a consensus is reached, both the supervisor and next level of management will sign the Position Evaluation (Form 1). The supervisor will enter the results on the Evaluation Summation (Form 2). Upon completion of all Position Evaluations, the supervisor will determine the candidate(s) selected based on the highest score(s) and so indicate in the appropriate block on Form 2.

The second level of review is performed and the appropriate signature block on Form 2 is signed by the next level of management. The Evaluation Summary is then forwarded to the director for his review and approval.

The selection evaluation package (EPQ/Job Description, Position Evaluation Form, and Evaluation Summation Form) will be taken to a Review Board for review and approval. The Review Board is made up of the Vice President of Production and two directors not associated with the selection process being considered.

The director, second level of management or supervisor performing the selection process will present the results to the Review Board and answer any questions the Board may have concerning the candidate(s) or the evaluation process.

Once the Board is satisfied that an objective evaluation has occurred, the chairman will sign the Evaluation Summary and return the package to the director for filing.

The supervisor or manager will make appropriate notifications of de-selected candidates. The de-selected candidates will enter the redeployment process per current Human Resource guidelines.

10/93
Position Evaluation
Form 1

_____
Position Title

_____
Candidate's Name

C/F	Current/Future Dimensions	Weighing Factor 1-3	Rating 1-5	Score
			TOTAL:	

Supervisor evaluation of current performance
(1-5) x 5 = _____

Average performance evaluation last 3 years
(1-5) x 5 = _____

Remarks:
Approvals: TOTAL: _____

Supervisor	2nd Level of Management	Director

10/93
Form 2

EVALUATION SUMMATION

_____
Position Title

	Candidate's Name	Total Score	Selected (Y/N)
1.			
2.			
3.			
4.			
5.			
6.			
7.			
8.			
9.			
10.			

Approvals:

_____
Supervisor

_____
2nd Level of Management

_____
Director

_____
Review Board Chairman

_____

[EXHIBIT 2 – Guidelines for Evaluation and Selection of Nuclear Operations Personnel as utilized by various supervisors omitted in printing.]

_____

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al.	)	
Plaintiffs,	)	
v.	)	
FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION	)	Case No. 95-123-CIV-OC-10
Defendants.	)	
FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION	)	
Defendants/Counterclaimants	)	
v.	)	
JOE N. BRANNON, THOMAS CATLETT, JR., MICKEY GAULDIN, DOUGLAS JANOWSKI, AND JAMES M. PENNINGTON, et al.,	)	
Counterclaim Defendants.	)	

DECLARATION OF JOHN A. HANCOCK

COMES NOW, the undersigned, John A. Hancock, and, pursuant to 28 U.S.C. § 1746, declares as follows:

1. My name is John A. Hancock. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I was employed by Florida Power Corporation ("FPC") from October 1967 until I left the active employment of FPC in November of 1997. From January, 1993 until my retirement, I held the position of Senior Vice President, Energy Supply.

3. During 1993, Florida Power saw the reality of rapid change coming due to the competition in the electric utility industry. Although the company was not accustomed to cut-backs, FPC realized that it needed to implement cost-cutting efforts to remain competitive. At that time, utilities were knowledgeable about the staffing levels and plant performance of other utilities. This exchange of information no longer occurs, because of the increasing pressures of competition.

4. Downsizing at Florida Power was purely cost driven. I received no quotas regarding the degree to which I would have to reduce my staff. Allen Keesler, then President of Florida Power, challenged the Senior Vice Presidents, myself included, to determine how many positions could be eliminated.

5. In my area, we focused on work functions, and analyzed those functions to determine what positions could be abolished or consolidated with other positions. I had control over the number of positions that were to be eliminated in my area. My managers and I made the determination as to how many positions to cut, and then relayed our conclusions and planned layoffs to Keesler, which he accepted.

6. The responsibility for determining the right number of positions to be abolished was mine, because, ultimately, I would be responsible for sustaining the quality of performance, despite having reduced staff.

7. My area was one of the first areas in the company to implement and complete reductions in staff. We worked with a representative from Human Resources, who counseled us on the importance of and ways to preserve employee dignity during layoffs. This sensitivity to our people was a very high priority for us.

8. FPC utilized the redeployment process to try to find positions for those employees whose positions were eliminated. It was difficult to place employees from the redeployment process into new positions in the company because employees generally possessed a very narrow set of skills. Employees at FPC typically spent their entire work lives in a single job function or job family. Although the expectations attached to the concept of redeployment were probably not as realistic as it should have been, the company's motivation was to try to provide legitimate job opportunities for its displaced employees.

9. I relied upon my direct reports to develop and implement a plan for reorganization and reduction-in-force. This group consisted of R. C. Bonner, who had responsibility for the coal fired generating plants; Bruce Baldwin who had responsibility for combustion turbine plants; Jim Stitt who had responsibility for energy supply services including engineering and the system maintenance crew; and Eric Major who had responsibility for generation construction. During the period in question,

George Marks replaced R. C. Bonner and became responsible for the coal fired fossil plants.

10. In my area we accomplished about a 20% reduction in staff, mainly through the closing in January, 1994 of the Higgins and Turner generating plants. Both plants were fuel inefficient and expensive to maintain and operate. This resulted in the elimination of approximately 100 exempt, non-exempt, and bargaining unit job classifications.

11. My managers determined the appropriate level of positions to eliminate from our area. The managers worked together, and also obtained information from plant managers and superintendents. I left the decisions as to what positions could be eliminated up to the managers. I was generally surprised by the high level of cuts that they decided were appropriate.

12. I did not make the selection or decision as to which employees would be terminated. The responsibility for making such decisions was assigned to managers and supervisors who had direct knowledge of the abilities, level of job performance, and skills of the persons under consideration.

13. Steven L. Koon, who was terminated effective January 21, 1994, was employed as Supervisor of Maintenance at the Anclote Plant. His termination was recommended by Plan Manager Hank Dumas. The severance benefits of the Redeployment process were made available to Mr. Koon. It is my understanding Koon was separated because the job performance of two other outage planners was considered to be superior to his performance.

14. Donald Breeden, who was terminated effective October 28, 1994, was employed as a Maintenance Planning Supervisor in the Crystal River Site Support Department. His termination was recommended by Edward Carnahan, Manger of Crystal River Site Support, and Roy Carr, Maintenance Superintendent. These managers selected Mr. Breeden based on their knowledge of his past and current performance and his capacity to contribute in the future.

15. Gary E. Waldo, who was terminated effective October 6, 1995, was employed as an Environmental Regulatory Specialist at Crystal River Plants 4 and 5. James Cossey, who was Superintendent of Technical Services at Crystal River Coal Plants 4 and 5, recommended to a management group consisting of Byron Covey, J. Baumgardner, Charlie Snipes, and Ray Clauss that Mr. Waldo be terminated and receive career transition benefits. It is my understanding that Waldo was separated based on management's evaluation of over 15 incumbent employees. Its evaluation took into account job performance and ability to function in the new organization.

16. Thomas Catlett, Jr., who was terminated effective October 28, 1994, was employed as Supervisor, Maintenance Planning, at the Crystal River Plants 1 and 2. His termination was recommended by Plant Manager Danny Douglas in conjunction with Supervisor David Brass. Mr. Catlett was offered, but did not accept, the severance benefits of the Career Transition process. It is my understanding that Catlett was selected over the two other supervisors because his primary responsibility involved planning work for maintenance crews during planned outages. When in early 1994 the outage schedule was

changed from a twelve to an eighteen month rotation, Catlett's responsibilities (unlike those of the other two supervisors) were substantially reduced, such that he was selected for separation.

17. Willis R. Barnes, who was terminated effective December 29, 1995, was employed as a Maintenance Superintendent at the Bartow Plant. Mr. Barnes received career transition benefits. Bernie Cumbie, who was Plant Manger of the Bartow Plant, in conjunction with George Marks, selected Mr. Barnes for termination. It is my understanding that Barnes was selected after management reorganized the plant and eliminated this position. Messrs. Cumbie and Marks evaluated Mr. Barnes and other management personnel and he scored lower than other candidates.

18. I also worked with the Human Resources department to deal with issues of poor performance separately from the staff reductions. I strongly emphasized to my managers the importance of exhibiting discipline to assure an objective performance review process, however challenging that might be.

19. Although poor performers were not supposed to be placed into the redeployment pool, there were times where this may have happened, since redeployment was an [sic] generally a more comfortable way to deal with marginal or poor performers.

20. Neither I nor any member of my organization had any involvement with the Tim Martin study, which was performed from late spring through July 1993 for the Nuclear Operations Division. Neither I nor any member

of my organization had any involvement with any separations or reductions in any area of Florida Power other than Energy Supply.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 1st day of August, 1998.

/s/ John A. Hancock
JOHN A. HANCOCK

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
FLORIDA OCALA DIVISION

WANDA L. ADAMS, *et al.*	)	
Plaintiffs,	)	
v.	)	Case NO.
FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION	)	95-123-CIV-OC-10
Defendants.	)	
FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION	)	
Defendants/Counterclaimants	)	
v.	)	
JOE N. BRANNON, THOMAS CATLETT, JR., MICKEY GAULDIN, DOUGLAS JANOWSKI, AND JAMES M. PENNINGTON, *et al.*	)	
Counterclaim Defendants.	)	

DECLARATION OF WAYNE C. FOREHAND

COMES NOW, the undersigned, Wayne C. Forehand, and, pursuant to 28 U.S.C. §1746, declares as follows:

1. My name is Wayne C. Forehand. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I have been employed by Florida Power Corporation ("FPC") since February 1981. I currently hold the position of Vice President, Energy Distribution, and have held that position since July 1996.

3. During 1992-93, pending deregulation of the electric utility industry led Florida Power to the realization that it needed to implement cost-cutting efforts.

4. Executive Vice-President Maurice Phillips communicated his desire to reduce costs, which required a reduction in staff. As a result, the three Regional Vice-presidents, myself, Janice Case, and Pete Dagostino, formed committees to respond to his proposal, and to determine which cuts would be made. I assembled my own team to review the structure of my organization in the North Florida Region.

5. The North Florida Region was divided into three functional teams with Susan Postans leading the Customer Service and Marketing team, Mike Harbour leading the Business Office team and Wally Guthrie leading the Engineering and Operations team. Each team gathered performance evaluations from the previous two years, collected input from field managers, and in some cases, made personal observations of each employee. For

example, Susan Postans developed an "Employee Inventory" form for her team members' use in obtaining input from supervisors and managers in her area.[1]

6. At the same time, the company was making a concerted effort to deal with poor performers. Poor performers were defined as those persons who had had at least one earlier poor performance evaluation and at least one other documented poor performance issue. Poor performers were to be terminated, and were not to be placed in the redeployment process. However, some poor performers were given redeployment and, later, career transition benefits.

7. I have been provided with a list of the original Plaintiffs, amendment Plaintiffs, and opt-in Plaintiffs in the case of *Adams v. Florida Power Corporation*. A number of these Plaintiffs formerly worked in what was then the North Florida Region.

8. Lorin Bryan, who was Manager of Energy Services was placed in redeployment status in late 1993 and advised that he was not eligible for any other position at Florida Power as a result of a sexual harassment claims against him. I approved the decision made by Susan Postans with respect to the termination of Mr. Bryan.

9. Diane Westbrook, who was employed as an Energy Services Support Specialist, separated in July, 1994. When Ms. Westbrook's position in Monticello was eliminated, she was offered a transfer to Perry, Florida to

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[1] A true and correct copy of Ms. Postons' "Employee Inventory" form is attached hereto as Exhibit 1.

work as a Customer Service Representative. She declined this offer and elected Career Transition benefits.

10. Roy C. Hooks, who was employed as a Line Foreman, was terminated in October, 1994. His termination was recommended by William H. Naylor when Naylor determined to reduce the number of foremen positions in his area of responsibility from five to four. Mr. Hooks was offered the opportunity to return to a position in the bargaining unit (Servicemen) in Cross City, Florida but he elected to take Career Transition benefits as opposed to transferring into this bargaining unit position.

11. I made the decisions that led to the separations of Alexa M. Richardson and Larry Bayes, who both were employed as Area Managers. I consolidated these two manager positions (and their territories) and selected Tom Tuckey for the combined job. I believe Mr. Tuckey to be either the same age as, or older than, Ms. Richardson and Mr. Bayes. While there were some performance-related issues with Ms. Richardson, rather than simply terminate her, I decided to provide her with Career Transition benefits. Because Mr. Bayes applied for long term disability retirement under the Company's plan, he was retained on the payroll at full salary and benefits for the required eligibility period.

12. Reductions in force at Florida Power were dollar driven, never people driven. The actual requirement to cut was driven by budget constraints. To my knowledge, no "headcount" reduction goals were ever given.

13. Neither I nor any member of my organization had any involvement with the Tim Martin study, which

was performed from late spring through July 1993 for the Nuclear Operations Division. Nor did I or any member of my organization have any involvement with any reductions that took place other than in Energy Distribution.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 6 day of August, 1998.

/s/ Wayne C. Forehand
WAYNE C. FOREHAND

EXHIBIT NO. 1

EMPLOYEE INVENTORY

EMPLOYEE NAME: _____
CURRENT POSITION: _____
CURRENT LOCATION: _____

DIMENSIONS	COMPETENT	DEVELOPMENT OPPORTUNITY	N/A
*Listening			
*Oral Communication			
*Oral Presentation			
*Written Communication			
*Technical Translation			
*Work Standards			
*Initiative			
*Stress tolerance			

*Energy _____

*Attention to Detail _____

*Vigilance _____

*Integrity _____

*Practical Learning _____

*Sensitivity _____

*Leadership _____

*Tenacity _____

*Sales Ability/ Persuasiveness _____

*Impact _____

*Rapport Building _____

*Behavioral Flexibility _____

*Negotiation _____

*Adaptability _____

*Independence _____

*Resilience _____

*Analysis _____

*Judgment _____

*Decisiveness _____

*Oral Fact Finding _____

*Innovativeness _____

*Planning and Organizing _____

COMMENTS:

_____

_____

_____

_____

_____

_____

_____

_____

_____

The following list includes the definitions of the dimensions included on the inventory. Please do not feel restricted to these. We can make additions to the list or COMMENT areas are provided for your use. I hope this list is helpful, it is simply a collection of the information in the Targeted Selection training manuals.

DIMENSIONS

Listening – Use of information extracted from oral communications.

Oral Communication – Effective expression in individual or group situations (includes gestures and nonverbal communication).

Oral Presentation – Effective expression when presenting ideas or tasks to an individual or to a group when given time for preparation (includes gestures and nonverbal communication).

Written Communication – Clear expression of ideas in writing and in good grammatical form.

Technical Translation – Converting information from scientific or technical documents and other sources into a communication understandable by laymen.

Work Standards – Setting high goals or standards of performance for self, subordinates, others, and organization. Dissatisfied with average performance.

Initiative – Active attempts to influence events to achieve goals: self-starting rather than passively accepting. Taking action to achieve goals beyond what is necessarily called for: originating action.

Stress tolerance – Stability of performance under pressure and/or opposition.

Energy – Maintaining a high activity level.

Attention to Detail – Total task accomplishment through concern for all areas involved, no matter how small.

Vigilance – Maintenance of watchfulness and attention over time.

Integrity – Maintaining social, ethical, and organizational norms in job-related activities.

Practical Learning – Assimilating and applying new, job-related information, taking into consideration rate and complexity.

Sensitivity – Actions that indicate a consideration for the feelings and needs of others.

Leadership – Utilization of appropriate interpersonal styles and methods in guiding individuals (subordinates, peers, superiors) or groups toward task accomplishment.

Tenacity – Staying with a position or plan of action until the desired objective is achieved or is no longer reasonably attainable.

Sales Ability/Persuasiveness – Utilizing appropriate interpersonal styles and methods of communication to gain agreement or acceptance of an idea, plan, activity, or product from clientele.

Impact – Creating a good first impression, commanding attention and respect, showing an air of confidence.

Rapport Building – Initial and continuing impact. The ability to meet people easily and to be liked; to get along

well with people and to put them at ease; and to quickly build rapport through pro-active development of close relationships.

Behavioral Flexibility – Modifying behavior to reach a goal.

Negotiation – Communicate data or arguments in a manner that gains agreement or acceptance.

Adaptability – Maintaining effectiveness in varying environments and with varying tasks, responsibilities, or people.

Independence – Taking actions in which the dominant influence is one's own convictions rather than the influence of others' opinions.

Resilience – Handling disappointment and/or rejection while maintaining effectiveness.

Analysis – Relating and comparing data from different sources, identifying issues, securing relevant information, and identifying relationships.

Judgement – Developing alternative courses of action and making decisions which are based on logical assumptions and which reflect factual information.

Decisiveness – Readiness to make decisions, render judgments, take action, or commit oneself.

Oral Fact Findings – Gathering information for decision making through questioning.

Innovativeness – Generating and/or recognizing imaginative, creative solutions in work-related situations.

Planning and Organizing – Establishing a course of action for self and/or others to accomplish a specific goal; planning proper assignments of personnel and appropriate allocation of resources.

EXHIBIT H

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, *et al.*	)	
Plaintiffs,	)	
v.	)	
FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION	)	Case No. 95-123-CIV-OC-10
Defendants.	)	

DECLARATION OF PETER DAGOSTINO

COMES NOW, the undersigned, Peter Dagostino, and, pursuant to 28 U.S.C. §1746, declares as follows:

1. My name is Peter Dagostino. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I have been employed by Florida Power Corporation ("FPC") since September 1968. I currently hold the position of Vice President, Bulk Power Delivery, and have held that position since July 1996. I previously held the position of Vice-President, Central Florida Region from January 1994 to June 1996.

3. In mid 1993, I received a directive to reduce budgeted expenses in the Central Florida Region from Senior Vice-President Maurice Phillips. In order to meet this directive it became apparent to me that organizational changes and workforce reductions would be necessary. I then had to determine how best to accomplish the reductions.

4. Due to a number of voluntary retirements, I did not have to make any decisions to reduce the managers who reported directly to me (my "direct reports") in the Central Florida Region. As a result, none of the Plaintiffs in this case were affected by this reduction.

5. My remaining direct reports made up my reorganization team. This team developed a new organization for my area, which I approved. This reorganization team identified the various positions that would be required in the departments, and then identified which among our current employees best fit the newly defined positions. I was not directly involved in the majority of initial decisions as to which employees would be separated, however, I did review and approve the selections made by the reorganization team. I do not recall overriding any of these selection decisions.

6. During this initial downsizing (at which time redeployment benefits were offered to terminated employees), I was assisted by a management team consisting of Wayne Forehand, Paul Lewis, Chuck Manning, Dawn Thompson, Keith Hulbert and Carla Morrison. Approximately a year later, when my area underwent another reorganization and downsizing (at which time

career transition had replaced redeployment as the severance tool), I was assisted by Chuck Manning, Dawn Thompson, Paul Lewis, Keith Hulbert and Carla Morrison. During each reorganization, these individual managers, or in many cases, the supervisors under their chain of command made the decisions as to who among their reports would be separated.

7. For example, Plaintiff Michael Harmeling, who was terminated in October, 1994, was employed as an Energy Services Analyst in Lake Wales. The number of individuals holding Mr. Harmeling's job classification was reduced, and Darlena Radford, Supervisor Market Retention & Operations, assessed Mr. Harmeling as having low potential, based upon abilities, skills and competencies. Ms. Radford made the recommendation to her manager, Dawn Thompson, that Mr. Harmeling be separated. Mr. Harmeling received career transition benefits at the time of his termination.

8. While a number of the Plaintiffs in the case of *Adams v. Florida Power Corporation* received the benefits of either the redeployment or career transition processes, these individuals were not necessarily separated as a result of any downsizing initiative. For example, Opt in Plaintiff Earl W. Bettis was separated effective May 22, 1994, from his Engineering Aide position in the Engineering Department and received redeployment benefits.

9. Mr. Bettis had been previously transferred, due to health reasons, from the Line Department into his entry level Aide position in Engineering. Mr. Bettis was never able to fully perform the engineering functions and was given very rudimentary engineering tasks, as well as, odd

jobs such as repairing broken sprinkler heads and running errands. When (pursuant to my directive and at the request of Division Manager Bill Britt) Department Manager Brad Shepherd was instructed to identify underperformers, Mr. Bettis was the [sic] identified from the Engineering Department. Because Mr. Bettis was not a bad employee, but simply could not handle the engineering work, the decision was made to provide him with redeployment benefits.

10. Similarly, Judith A. Carey, who was employed as a Supervisor in the Customer Service Center, separated in October, 1994. Ms. Carey's department was being combined with another area and, at that time, she had been requested to provide her manager, Keith Hulbert with different areas of interest to pursue her career with FPC. Mr. Hulbert had been charged with consolidating the Business Offices along with Billing, New Services, and other functions within the Central Florida Region. Although Ms. Carey had been assured another position within FPC, Ms. Carey instead elected to take a career transition package to pursue another career.

11. Neither I nor my reorganization team had any involvement with any reductions that took place in the Nuclear Operations Division, the North or Suncoast Florida Regions, Energy Distribution, Energy Services or any area other than the Central Region.

I have read the foregoing Declaration and declare under penalty of perjury that it is true and correct.

Executed this 5th day of August, 1998.

/s/ Peter Dagostino
PETER DAGOSTINO

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
FLORIDA OCALA DIVISION

WANDA L. ADAMS, et al. Plaintiffs, v. FLORIDA POWER CORPORATION AND FLORIDA PROGRESS CORPORATION Defendants. FLORIDA POWER CORPORATION Defendant/ Counterclaimant v. JOE N. BRANNON, THOMAS CATLETT, JR., MICKEY GAULDIN, DOUGLAS JANOWSKI, AND JAMES M. PENNINGTON, *et al.*, Counterclaim Defendants.	)	Case No. 95-123-CIV-OC-10

DECLARATION OF ROY C. CONNER

COMES NOW, the undersigned, Roy C. Conner, and, pursuant to 28 U.S.C. § 1746, declares as follows:

1. My name is Roy C. Conner. I am competent to testify to, and have personal knowledge of the facts set forth in this Declaration. I understand that this Declaration is for use in connection with the above-captioned civil action and I give it freely for that purpose.

2. I was employed by Florida Power Corporation ("FPC") in 1977. From 1992 to 1995 I held the position of Director of Business Process Improvement ("BPI"). I left FPC's employment in 1998.

3. During the 1991-92 Strategic Planning Sessions, the company identified the need to improve organizational effectiveness. FPC saw competition coming due to the deregulation of the electric utility industry, and realized that it needed a bigger and faster method to turn the company around. FPC management was aware of cost-cutting efforts being taken by competitors.

4. At FPC, the average span of control, that is, the ratio of employees to supervisors, was approximately 6 employees to each supervisor. FPC was "top heavy," and was not in line with other companies, whose ratio was generally 10 employees per supervisor.

5. FPC formed a committee to address the problem of organizational effectiveness. I was a member of the committee. One of the first actions taken by the committee was to interview and select an outside consultant to develop a plan for business improvement. We selected Ernst & Young, because they exhibited a more thorough understanding of the problems facing FPC.

6. We began with an Organizational Design study led by Ernst & Young. The direct reports of each Senior

Vice President identified all of the processes performed and the resources used to perform those processes. This exercise resulted in a list of 83 current processes, along with the costs and number of personnel associated with each process.

7. In December 1992, I assumed the position of Director, Business Process Improvement ("BPI".) Part of my role was to serve as a liaison between FPC and Ernst & Young. BPI was officially kicked off in January 1993, and began with 4 projects: Power Plant Procurement, T & D Inventory Management, Customer Inquiries and Other Requests, and New Services.

8. The objective of the BPI process was to utilize an evolutionary approach to increase efficiency and level of customer service. BPI focused on process improvement and cost reductions rather than personnel reductions. BPI analyzed the number of personnel required to complete a process, and was designed to reduce costs where a process was identified that was consuming an unreasonable amount of resources.

9. The BPI methodology was composed of four phases – target, analyze, design, and implement. The first phases were the targeting and analyze phases, where the BPI team worked with management to identify the process to be studied. The BPI team documented management's goals for the process, the way in which the process functioned, departments involved, and resources necessary to complete the process.

10. The third phase of the BPI methodology was the design phase, where the team analyzed possible ways of improving the process, and produced a "future state"

analysis report. It was during the design phase that recommended changes were applied to implement the "future state" of the process.

11. BPI was not intended to address issues such as manpower or head count, and did not always result in a reduction in costs. On occasion, the BPI process would identify a process with inadequate resources, and the result would be that resources devoted to that process were increased. As a result of the 23 separate BPI projects completed during Jan. 1993 through Dec. 1995, 204 full-time positions were targeted for removal from processes that had been redesigned, however, only 160 positions were actually removed. The BPI study did not focus upon nor even identify specific employees within the positions targeted for removal.

12. The concept of the redeployment process was suggested to FPC by the consultants from Ernst & Young, and was designed to accommodate the anticipated small number of employees who would be displaced as a result of BPI.

13. During the time that the BPI team was designing slow and gradual changes to be applied to the various processes, there was increased pressure throughout the corporation to reduce costs. In many areas this thrust translated into workforce reductions. The sudden influx of employees to the redeployment process as a result of the reductions in force caused the redeployment process to crumble, because there were few opportunities to place redeployed workers into other jobs within the company, since all departments were facing cutbacks.

14. The BPI project continues to operate at Florida Power.

15. Neither I nor any member of the BPI project nor anyone at Ernst & Young had any involvement with the Tim Martin study, which was performed from late spring through July 1993 at the direction of Pat Beard for the Nuclear Operations Division ("NOD"). Nor did I nor any member of the BPI project nor anyone at Ernst & Young have any involvement in any workforce reductions or reorganizations in the North, Central, or Suncoast Florida regions, energy supply or energy delivery.

I have read the foregoing Declaration and declare upon penalty of perjury that it is true and correct.

Executed this 4 day of August, 1998.

/s/ Roy Conner
ROY C. CONNER

Adams et al. v. Florida Corp.
and Florida Progress Corp.,
Case No. 95-123-CIV-OC-10A
United States District Court for the
Middle District of Florida, Ocala Division

Exhibits A through S, and V to Plaintiffs'
Response to Defendant's Motion to Decertify
and Incorporated Memorandum of Law

September 30, 1998

EXHIBIT A

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Executive	A8A	231-5721
Office	MAC	Telephone

SUBJECT:

TO: Organizational Design Participants
DATE: May 22, 1992

For some time now I have been excited about starting an Organizational Design process to better manage the most effective organization possible. The Organization Design Task Force, under the direction of George Rickus and Janice Case, with representatives from all major areas of the company, proposed a process which was approved by your senior management and will begin on September 7th. This time frame was selected so intensive work required by the rate case can be finished, the nuclear outage completed, and most vacations behind us.

"Phase I", examination of the top three layers of the company, will begin on September 7th. Your attendance is critical to the success of this project. During the approximate forty-day time frame (see attached schedule), I am personally requesting each of you to be available on the days indicated as we cannot adjust dates for individuals nor are substitutes acceptable. You should note that your attendance is required at four three-hour meetings during this time.

We have contracted with Ernst & Young of Atlanta to help facilitate this program. Janice and George will give an overview of an introduction to the process at our June 8th Strategy Session, and Michael Heideman of Ernst & Young will be at the August 10th Coordination Meeting to meet participants and discuss some preliminary assignments.

My objectives for the overall process can be summarized as follows:

> While employment will increase as parts of the Strategic Plan are implemented (particularly in conservation and customer information), it is my goal that the company have the same number of employees by January 1994 as it had in January 1991. This will mean that we will have to be more critical in our thinking when filling open positions, and we will have to be more skillful in redeploying people from historical areas of importance to those organizational areas of strategic and tactical future importance.
>
> A reduction in organization layers where appropriate.
>
> Increased responsibilities so that jobs can be made more challenging. This clearly includes increasing spans of control where appropriate.
>
> Non-value-adding work processes discontinued and value-adding processes strengthened where possible.

We have a tremendous opportunity to achieve significant improvement in the way we conduct our business and the manner in which products and services are provided to internal and external customers. I urge all of you to fully

participate in this process as a team player. Anyone who comes to the meetings more concerned about "protecting turf" than improving the organization will not benefit and may even suffer from the process. Our ability to achieve competitive excellence will be up to each of us, and I believe you will more than rise to the challenge.

I look forward to working with you on this exciting and challenging process.

/s/ A. J. Keesler, Jr.
A. J. Keesler, Jr.

AJK:bbc

Attachment

EXHIBIT B

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a rate increase by Florida Power Corporation.	DOCKET NO. 910890-EI

DEPOSITION OF: Allen J. Keesler, Jr.

TAKEN AT THE INSTANCE OF: The Staff of the Florida Public Service Commission

PLACE: Florida Power Corporation
3201 34th Street South
6th Floor
St. Petersburg, Florida

TIME: Commenced at 10:07 a.m.
Concluded at 11:41 a.m.

DATE: Monday, January 4, 1993

REPORTED BY: Brian L. Boles, RPR
Notary Public
State of Florida at Large

[2] APPEARANCES:

MICHAEL A. PALECKI, Staff Counsel, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Room 226, Tallahassee, Florida 32399-0863, Telephone No. (904) 487-2740, appearing on behalf of Florida Public Service Commission.

JAMES A. MCGEE, Senior Counsel, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

RICHARD W. NEISER, General Counsel, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

ROGER HOWE, Office of Public Counsel, 111 West Madison Street, Room 812, Tallahassee, Florida 32399-1400, Telephone No. (904) 488-9330, appearing on behalf of the citizens of the state of Florida (via telephone).

[3] INDEX

	Page No.
CERTIFICATE OF REPORTER	65
WITNESS:	
ALLEN J. KEESLER, JR.	
Examination by Mr. Palecki	5
Examination by Mr. Neiser	55
Examination by Mr. Palecki	62

EXHIBITS

Number:		Identified
1	Interoffice Correspondence dated 5/22/92	8
2	Interoffice Correspondence dated 9/21/92	8
3	(Late filed) Date of staff meeting concerning work force reduction or date task force was initiated	17
4	(Late filed) Latest information to rating agencies	43
5	(Late filed) Notes of rating agency meetings within the last six months	45

[4] ALLEN J. KEESLER, JR.,

appeared as a witness and, after being duly sworn by the court reporter, testified as follows:

MR. PALECKI: We're going to be taking two depositions this morning, and the other is Mr. Scardino. Normally, we don't invoke the rule, but I think in this deposition, I would prefer to do both witnesses separately, if you don't have any objection.

MR. NEISER: Well, is there a reason for that, Mike? As you say, normally, we have not done that in our depositions in the whole rate case, that I know of.

MR. PALECKI: The only – the only reason is to – I would like each witness to provide their independent recollection of what has occurred, and I'm just concerned that with both witnesses in the room together, it's – it can influence the testimony.

MR. NEISER: Okay.

MR. MCGEE: I have no problem.

MR. SCARDINO: Will you call me when you're ready for me? 4722.

[5] EXAMINATION

BY MR. PALECKI:

Q. Just to start off, we called this deposition to discuss a proposed work force reduction that the commission learned of from several newspaper articles, and I believe the first publication was that we – that we saw was a November 5th, 1992, Florida Power Corporation newsletter that stated that there would be – or were plans for a reduction of approximately 200 employees in the 1983 (sic) year.

I guess to start off, how was the decision made to cut the work force?

A. Okay. Let me go back, if I can, counselor, to early '91, but let me first correct a statement that has been made that's erroneous. The 200 number came about when I addressed a group of employees about a rumor, and I believe the wording I used was, I would like to put to bed a rumor, and the rumor was, Mr. Keesler, are we going to reduce forces by 200? And the answer is, No, we're not.

So 200 has never been – even though our own publications have reported it that way – has never been a number that I used or that anybody on [6] my staff ever used, other than what appeared in the paper and just what appeared in our own publications. The number, Mike, is 150; it's not 200. And that was what I later corrected to this – I mean, to this group of employees.

And now let me go back and tell you how I arrived at 150. In early 1991, we undertook probably the first formal strategic planning process in our company's history. We had done a lot of tactical planning year to year, but never really a formal strategic plan that said what do we want to be when we grow up and where do we want to be in five years and ten years.

And it was a very intensive year to develop a strategic plan. And out of that came the realization that if the numbers were correct, the company was going to grow, I believe the number was 213 just to implement the strategic plan. Had nothing to do with regular growth or anything else, but just the strategic planning part was going to be 213.

The majority of that number was driven by the MACS case for conservation, and a brand new customer information system that would provide us with a much more state of the art capability of [7] dealing with customer contacts, competitive information and so forth. Those were the drivers of the big number, of this 213.

At the same time we discussed empowerment. And I was – had probably been guilty, as I would guess many CEOs are, of maintaining as much control at the top as I could. And prior to this time, any increases to employment base were approved by me. And I said, If we're going to walk our talk and we're going to empower people – I gave all the people that reported to me the right to handle increases in employee base. That's – it did not have to come to me to get final approval. That's part, we thought, of pushing down authority and responsibility to run their areas.

So as I looked at 1992, and I'm thinkir.g, We're going to add 213 people as we implement the strategic plan over a two- or three-year time period, and if we have natural growth on top of this, and all the unknowns – I knew we were having more conservation hearings, which we're presently undergoing today; I knew the environment was changing, the SO2, change of scope and growth – I said, I've got to do something to [8] hold down employees.

So I wrote a memo on May 22nd to all the participants of this – of our organizational design teams to – and that was formed, Counselor, to make sure we were organized the way we wanted to be organized as we went forward. We did not feel we were in a position prior to

this organizational development to – I mean, to maximize our successfulness going forward.

Q. And, for the record, that's the memo, the interoffice correspondence dated May 22nd, 1992, that your counsel has handed me this morning?

A. That is correct, sir.

Q. I also have a memo, an interoffice correspondence memo, dated September 21st, 1992.

I'd like to go ahead and enter these as deposition exhibits, the May 22nd memo being Exhibit 1, and the September 21st memo being Exhibit 2.

Now, when you've been talking thus far, you've used the word "I," what I thought and what I decided. Is this decision-making process one that you do independently, or is this something that you take to a board meeting or that you have [9] a staff working on with you?

A. Typically, Mike, it was one where I have staff working with me.

I had grown frustrated, which I do frequently, and so the memo of May 22nd was written totally by me without the help of any staff counsel, and it was written only with the premise that I was concerned about where we were growing, so I artificially went back to the first year we started strategic planning, which was in 1991, and said to my staff and the other people on the organization design team, that it was a goal, and I – please bring out the word "goal." It was a goal that we not increase staffing beyond where we started this strategic planning process in January 1991.

When this – when this memo hit the street, so to speak, my staff, to put it nicely, went into orbit, and they came back to me, and they said, Allen, this is just impossible. We cannot continue to give service, and we cannot continue to grow and do the strategic plan and not have any increases.

And I said, well, you know, you've convinced me, but I want to get my point across [10] that if we're not careful, we're going to grow much faster, much, much faster, than we think we're going to grow. And I think I used the analogy to them, if I give my wife money to go buy a dress, by the time the outfit's bought, there's a lot more money spent than we had originally talked about, and I feared that that was going to happen here.

So I artificially chose a plug number of 150. I said, I want to reduce the work force by 150 people while we are implementing strategic planning, while we're going through growth, while we're looking at increased conservation needs. All these things ran through my mind. And I said, If I don't manage growth of this company on one hand and push back, I'm going to grow faster than I want to grow. We have taken pride in the fact that we're the lowest O and M expense company in the state. We want to stay there. And to me, I have found over time that if you wait until you get someplace and then you strike back, it's too late. So I chose an artificial plug number of 150 employees and said, I want to reduce staff by 150 employees.

Now, that was to include outsourcing. [11] We made the decision six months ago not to hire anymore full-time janitors, as a for instance, but to go contractor for those

jobs as people retired. We are going to probably look at many other areas in the company and find out, does outsourcing in today's marketplace make sense rather than replacing full-time employees? Can we get maintenance work done by outsourcing rather than have a – rather than having our own maintenance department? Can we do payroll by outsourcing at a cheaper base than having our own payroll department? We don't know that, but we're going to look at that over the next year or so.

And it was just to push back, from my point of view, to push back on the organization that you've got an artificial barrier up here that the old man's setting to make sure we don't grow faster than we need to grow, and that was the whole premise of my 150.

Now, my senior staff then left that meeting and worked independent of me to try to come up with a plan to reach that goal, and I – you know –

Q. When you said they left that meeting, what was – when was this meeting? Was this after [12] you wrote the May 22nd memo?

A. Yes, sir. And I can't tell you – it was a staff meeting, and we have staff meetings every two weeks. It was just – as I remember it, it was part of a staff meeting, and the senior officers left that meeting, as I remember, and independent of me, worked together to try to come up with what could they do to reach this artificial goal that I had set for them.

Q. Were –

MR. NEISER: Do you mean artificial or arbitrary?

THE DEPONENT: Arbitrary. I'm sorry. Plug number, just a plug number.

BY MR. PALECKI:

Q. Were the managers at that meeting given goals for their – for their departments?

A. No, sir. I never set those. I only looked at the company as a whole. I set 150 people as I look at the entire company.

Q. Was the May 22nd memo discussed at that meeting?

A. Counselor, to some degree, I'm sure it was. I do not remember. I know that I had various calls after my May 22nd memo came out [13] saying that they thought my expectations were unrealistic, and I said, Well, then, let's talk about them.

Q. Now, when you say a staff meeting, what – are you talking about a meeting – or how many people attend a meeting like that?

A. My immediate staff. At the time this was done, six people.

Q. And who would they be?

A. They would have been Mr. Greene, Mr. Neiser, Mr. Phillips, Mr. Beard, Mr. Hancock, Mr. Miller. And that's assuming they were all in town.

Q. And what happened as a result of that meeting after you sent your staff out to – I guess you asked them to report back to you on where they could make –

A. Well, not – not really. They, independent of me, elected to set up what we call a pace team, and it was under the direction of Mr. Greene, to see what they could do to try to attain this goal.

And when – I guess you have to understand partially my management style. I – I believe in setting many times what might be [14] unachievable goals in my mind because I think if you don't stretch people, you never get what you can ultimately get if you do stretch people.

So I very definitely say this was a goal, and I always communicated it as a goal. Like making our forecast is a goal. You know, that's your best try, push as hard as you can, and, you know, let's see what happens.

But I guess the thing that drives me – that drove me then, Counselor, and drives me today, are all the unexpected things that are taking place in this industry that nobody knows what's going to happen, that you've got to respond to; and that if all we do is manage year to year based on the best guesses we have going into a year, it's my prediction we're going to be in deep trouble at the end of the year if we're not doing things ahead of time to try to – to try to out-guess what NRC may do, what's going to happen in the environment. I mean, these kinds of things are going on all the time. Totally out of our control, but we've got to respond to them.

Q. So what has happened since this meeting that – where you first told your staff to see where they could cut, where they could make [15] reductions?

A. Well, it was a goal that I had challenged to them. Until we got a phone call from – from your people, very,

very little took place, that I was aware of. I think, you know, each of the senior officers to some degree or another – and the only communication we can find was the second piece that you were given this morning was from Mr. Phillips, where he responded directly to the people in his area. I – to the best of my knowledge, that is the only piece of communication that's out there.

Q. And that's the September 21 interoffice correspondence?

A. Yes, sir, that is correct.

Q. And then I believe there was also a November 5th, it seemed like a company memo?

A. Yes, sir. Power Lines.

Q. And that goes to all the employees, doesn't it?

A. It goes to all the employees, it goes to PSC, it goes to the retirees, and it goes to a selected group of people in communities.

Q. And soon thereafter, around November 11th, was when the press – I believe we have [16] articles from the Tampa Tribune and several other newspapers – reported it?

A. Yes.

Q. Was there a press release issued, or how was the media informed?

A. I do not know. I think what happened – and, again, I can only surmise this – is that as people began pushing back in their own organization, somebody came to me with the rumor that they were going to reduce 200

people, and that's when I went public for the very first time. It wasn't to announce a layoff, wasn't to announce a reorganization, but it was to dispel a rumor that we were going to cut the work force by 200 people, and that's – that's when it all became public in early November.

Q. So you wanted to do something to quell any employee panic that might occur if there were rumors of layoffs?

A. Absolutely. And the other thing that we have been told through employee surveys is that we have not been – they – the employees perceive that management has not communicated as quickly and as up front with them as they would like them to. So one of the things we are trying to do is to openly [17] communicate with the employees as soon as we know what we're going to do to let them know.

Q. Now, this meeting of your staff that you're discussing, I asked you when it was, and you – I think you answered you weren't sure. Can you tell me what month it was? I mean, are we talking soon after your May 22nd memo, or are we talking during the rate case or after the rate case? Can you give me some time – type of time?

A. Mike, if I were to give it to you here today, I would guess. I can probably go back and find out from Mr. Greene when he set up the task force and can then probably zero in within a few days of, you know, when that staff meeting was held.

Q. If you could give –

A. I mean, that's the best I can do, to be honest.

Q. If you could just give me that as a late filed exhibit.

A. Okay.

Q. Either the date of the meeting concerning work force reduction or the date when the task force was initiated.

A. Okay.

[18] Q. Whichever you are able to obtain. And if you can give both dates, that would be helpful.

A. And, again, let me clarify one statement. When we're talking about work force reduction, again, understand that the reason we have – we today have no plan, have no planned work force reduction. What we have is a goal to push back against what we believe to be growth that will be much greater than we have predicted. I do not think we can live within the 1993 numbers knowing things I know today.

Let me, if I might – Roger, I'm going to the board, and I'm just going to give you a couple of numbers.

MR. HOWE: All right.

THE DEPONENT: As of, I believe, December 13th, we had 5,851 active employees. That's how many were paid on that payday. We know we're going to pick up Sebring of 46 employees, and these are the unknowns that I talk about that I can't manage too. It now puts us at a number of 5,997 – I'm sorry – 5,897 that we have on the first day of January, and we haven't done any growth, we haven't got anything to man the [19] strategic plan that's here. We don't have anything for the new intercession

city peakers, we don't have anything for the Gainesville peakers. I mean, this is just as of January 4th, including Sebring. We've got 5,897, and I believe the number given in the rate case on a five-year average growth was 63 employees per year.

Now, I – you know, that's a five-year growth period, but if I just factor that number in alone, and factor in nothing else, I've exceeded the number of employees that the commission authorized in the rate case testimony in Tallahassee in 1992, and that doesn't account for the fact that we've got 38 people yet to fill in the conservation areas. You're presently undergoing conservation hearings, and I have no idea how many additional people are going to fall out of that.

As I said earlier, it doesn't count the new intercession peakers, it doesn't count Gainesville; it doesn't count what we may do with the gas pipeline in 1993, and that's why I say that if I don't use plug numbers as goals to push back, I'm going to grow so much faster than I plan on growing that I'm going to have a much more [20] difficult management problem.

Q. Do you think that the goal of reduction of 150 employees in the year 1993 is a realistic goal, one that you can meet?

A. Mike, it's as realistic as every NFL football team on the first day of the season wants to be 16 and 0. I mean, it's a goal. If we did it, it would be extraordinary. I hate to say I don't think it's possible. I guess my frustration is if I could control everything that happened to me externally and I knew what that was going to be today, then I would feel much better about achieving that goal,

but I don't know what's going to happen to me externally. I – you know, I just – I worry about the environment. I worry about added employees out of conservation, because I truly believe we're going to have different conservation goals.

I mean – and that's – you know, I think these things are part of doing business in the nineties.

But if I could control, if I could isolate all the externalities that I think are going to impact me, then I probably wouldn't have set 150; I probably would have set a much smaller [21] goal.

Q. Now, this goal is to reduce the work force by attrition and not lay off or fire people?

A. That is correct, sir.

Q. Have you done a study as to what the natural attrition will be in 1993 to determine whether the goal of 150 employees is one that can be met through attrition?

A. Well, let me explain to you what I mean by attrition. We have about 100 employees a year retire. In 1992, we had more than that because of a medical plan benefit that was going to expire at the end of '92, but typically we average about 100 employees a year.

Mike, I don't know how many posting opportunities we have in the union, exempt in nonunion, but I would guess several hundred during a year, if – you know, just if you looked at every time a job was posted, because you've been promoted to lineman, your lineman apprentice job is open. So I see those as potential opportunities not to fill the lineman apprentice job, and those number two or three hundred, I'm going to guess. I don't know.

You know, we have a number of employees that leave for other reasons [22] throughout the year.

So, yes, I think if – I know, if you had no external factors and you could control everything that happened to you, if you really wanted to get tough, you could probably find 150 through natural opportunities that take place in a year.

Q. Was the goal to reduce employees voted on by anybody? Was there –

A. No, sir. We don't vote here.

Q. Was this ever addressed by the parent corporation, Florida Progress?

A. No, sir.

Q. So I just want to make sure I'm clear on how this decision was made. It was your memo of May 22nd, which was an independent memo that you did yourself that was not a staff memo or a team decision but just your personal decision.

After that, you had a meeting. You created a task force, and –

A. They really created themselves, Mike. I did not create the task force. It was their suggestion that they go off and see what they could do.

Q. And what has the task force done since

[23] then?

A. I have had very little impact with them. Perhaps Mr. Neiser could answer that better than I could, but I have never met with the task force.

Q. Well, Mr. Scardino is the next witness. Is he on the task force?

A. No, sir. Only senior officers were on the task force.

Q. So he wouldn't know what the task force –

A. No, sir. I believe in the – I believe in the memo that Mr. – that Mr. Neiser gave you earlier, there's a handwritten sheet that I have not seen, from Mr. Phillips, that is part of the work of the task force.

Q. That is the second sheet of Exhibit Number 2, the September 21st memo?

A. Yes, sir.

Q. And this outlines the number of employees throughout the company?

A. Yes, sir. And what they said to me was, Allen, you can have it one or two ways, but you can't have it both ways, and I – I believe, as I recollect the conversation, they took the '91 [24] numbers and added to it the strategic plan in one or two other areas, and came up with a new number, and it was from that artificial number that I said 150, because I feel that's the impact of externalities, if I can use that word, in today's market.

I mean, I knew at that time we were negotiating with Sebring. you know, that's 50. We are negotiating, have

been for two years, with – I mean, with another electric utility in the state of Florida that we could possibly close in the next year or so. All of these numbers, you know, aren't in any rate case, Mike, or any other – these are things I know.

Q. Is that the Fort Meade utility?

A. No, sir, that is not the Fort Meade, and I am really not at liberty, simply because it is such a critical, confidential negotiation, but it is not Fort Meade. That is a wholesale customer.

Q. I won't ask anything further about that.

Could you explain what this authorized position sheet –

A. If you give me a chance to look at it.

Q. Sure.

[25] A. Because I've never seen it.

Line 1 shows the base broken down by the six reporting areas, which are the six people that report to me, effective January 1, 1991, was, and that number is 5,754.

Q. Is that the number that you wish to get down to?

A. Well, that was the number that I had, as my staff said, unrealistically wished to get down to in my direct memo to them.

They added back to that the impact of the strategic plan, which was 213 positions, and they added two other areas, which I really don't know what they have in mind. They added change in scope of 15 jobs and departmental

transfers of 8 jobs. And I can't explain that to you, but the new base became 5,990. That included no growth or anything else. That was just the new base, taking the '91 employees and adding to it primarily the strategic plan. And that number was 5,990.

Q. All right. And what's the next line on that?

A. The next line is reduced two and a half percent. Now, that's their number, because I never used two-and-a-half percent, I just used 150 [26] as a plug number. They must have backed into that.

Q. Does that work out to two-and-a-half percent?

A. Practically. Two and a half percent of 6,000 would be 150.

Q. Uh-huh.

A. And then I don't know how they broke it down departmentally, unless they just took direct ratios of department sizes to the overall organization and broke it down. I have no idea how they arrived at those numbers.

Q. And what is – what are the next lines on the sheet?

A. The goal for 1/1/95, if you assume a two-and-a-half percent reduction, and then they show another reduction in '94 of 86, and I have no idea where they got that number.

Q. So that's an additional 86 in addition to the 150?

A. Yes, sir. And I think that was to get back – I think what they were trying to do was show me how unrealistic it was to get back to the 1991 number.

Q. In other words –

[27] A. But I can't – I can't honestly answer that for you.

Q. To get back to the 1991 number, it would require a reduction of 150 employees –

A. Plus 86.

Q. – plus 86 the next year?

A. That is correct.

MR. NEISER: And no growth.

BY MR. PALECKI:

Q. And no growth.

A. And no strategic plan.

Q. I thought the strategic plan was added on.

A. It is, sir, in that number right there, and that was a number we ultimately decided was the new base. But to get back to this number, you had to go 150 plus an additional 86.

And, Mike, if I could do that, I would love to achieve that. I mean, I – I have nothing against trying to achieve that. My frustration is all the things that are going to happen to me as we sit here today that I don't even know. What is the impact of the conservation hearings going to do to my employment base sometime this year? I don't know that, but I – but my guess is it's [28] going to change.

And what's going to happen with some new rule promulgated at NRC? And I know we're building new

peakers at Intercession City, I know we're building a peaker at University of Florida. I know we've got built in two, two-and-a-half, three percent customer growth. I mean, all of that is being ignored here, and still, you know, all I'm trying to say is I'm fighting back on the left hand so the organization on the right hand doesn't move faster than I want to see it move.

And I think when you look at the actual numbers that we're living with today, you can see – I mean, you can see the impact.

Q. Would it be fair to say that it is still your goal to achieve the January 1, 1991, base work level, level of a work force but that you believe 150 employee reduction is a more reasonable goal?

Q. I guess it would be fair to say, Mike, that I would like to achieve the maximum number of efficiencies I can achieve, whether the number is 300 or 400 or 68. I do not believe, after my staff came back to me and just did those numbers, that my original, totally prepared by me goal was [29] fair, not if I want to continue to provide decent service.

Q. And that was the original goal, to go back to the January 1, 1991 –

A. Yes, sir.

Q. – work force?

A. Yes, sir.

Q. Do you believe that the 150 goal is more fair?

A. Yes, sir. Anything short of that number would have been more fair. Now, again, do I – do I think we will

reach it? I don't know, but it's 150 off of a different base. And we already know that we've got a third of that gone with Sebring.

I mean, you know, just what we know today, we've got roughly 50 new jobs that we did not have during any of this that we already are going to have to accept when the Sebring closing takes place. And that, to me, exemplifies the outside forces that are working that I can't manage too. And that's why I'm going to continue every year to push back in some way to make sure that we don't grow faster than I want to see us grow.

Q. Would it be fair to say that certainly [30] the commission in setting rates should consider your actual goals and plans, and, for example, you've stated that you expect additional employees due to the strategic plan, additional employees because of the intersection – intercession peakers, the new Gainesville plan, and certainly those are figures the commission should consider, along with any planned reduction as well.

A. Yes, sir. As long as you understand that in my style of management, a plan reduction, to me, is when I go out and set forth a plan that says, we're going to – you know, we're going to get rid of two attorneys and fourteen accountants. That hasn't been done. This is not a planned reduction. This is a goal to try to fight off faster growth than if I wasn't pushing back, I believe, that otherwise would take place.

Q. Is it fair to say that that planning is still ongoing?

A. Yes, sir. Absolutely. Because I believe if it's not ongoing, Mike, and if we don't get some pushing back,

we're going to well exceed the number that was ultimately approved in the rate case.

Q. Do you have any time schedule? Is the [31] task force planning to get back with you with more detailed numbers as far as –

A. No, sir.

Q. – where the cuts will be made?

A. No, sir.

Q. When do you anticipate that that will – when you'll reach that level of planning?

A. I don't know. I mean, I don't know – we've just gone through a major restructuring that came out of the organizational design force. Several of the original people don't even have the same responsibilities they had as we enter the new year.

Q. Is this work force reduction related to or part of that restructuring?

A. Let's see. It wasn't work force – no. Well – no. It was very, very isolated. But what I said to the task force that was looking at organizational design, again, as pushing back to them, I don't want to design this organization that we're going to grow with more people. And that's why it was in that memo that I challenged them with my original challenge.

But we now are totally differently organized than we were prior to today. The new [32] organization takes effect today. Mr. Greene no longer has financial services. Mr. Neiser has only legal services. Mr. Miller no longer has the administration section.

We have totally reorganized being driven by a GENCO, TRANSCO, DISCO expectation down the road someplace, and we now have a transmission and substation area reporting directly to me that we never had prior to today because we think that's where the industry importance is going to take place. And with open wheeling on the transmission system, we think it has a very significant impact on where this company is going to go in the future.

So that's what the organizational design looked at, Mike, and that was, How can we reorganize to be successful, effective, and a survivor as we go forward? It had nothing to do with any kind of a work force reduction. But we have a very different-looking organization today than we did when we had the rate case.

And I will tell you I believe out of that will be a few new positions.

Q. Now, it's my understanding that the 1993 test year in the rate case included 5,950 [33] employees.

A. I have no idea. I never use – I had – until John Scardino told me what was in the rate case one day last week, I had no idea of any number in the rate case. I was not trying to design to a rate case number. I was only trying to put up a road block to what I saw taking place with the employee base, but I had no idea what a rate case number was, and I have to [sic] idea if that's the right number you've just given me.

Q. Getting back to the Exhibit Number 2, the handwritten sheet attached to it, which is entitled, "Authorized Positions," was this done or included on the

September 21st date? I notice they're attached, and I guess what I'm trying to get at is, were they done together, or is the attached sheet, was that issued at some other time?

A. Let me tell you what I think. And, again, I didn't get a copy of this memo, nor did I get a carbon copy, but that appears to me to be Mr. Greene's handwriting that took place when they had a task force meeting, and all Mr. Phillips did was send this information out as part of the task force.

[34] So I would assume that they did not take place on identically the same day, sir. I think this was a – this was what came out of the senior task force, and I think Mr. Phillips just sent this to his direct reports. So I do not believe it happened the same day, but I was not there, and I don't know.

Q. Did the issuance of the rate case order have any bearing on the November 5th, 1992, release of information on employee reduction?

A. None whatsoever. I mean, again, as I said, the only reason that had any impact was because I addressed a group of employees to try to dispel a rumor.

Q. How did that come to your attention?

A. I had – I had, as I do visit various employee groups from time to time, and I frequently will make a few comments and then open the floor up to questions, and as I best remember in that preceding three or four days, I had heard several people in several of these employee groups – anytime we have a training session for anything, I try to attend the training session just to

say hello. So I do this quite frequently, and I had picked this rumor up a couple or three [35] times, and I went downstairs and said, you know, this is – we've got to do something to stop this rumor; it's not true, and that's how it came to my attention.

Q. What will happen from here on out with regard to the goal of 150, reduction of 150 employees?

A. I will probably now go back to a brand new staff, Mike, of which I now have nine direct reports instead of six, and reissue the challenge and try to get a different buy-in because we have different structure than we had then.

I certainly feel nothing has changed, that the external pressures of the outside are going to cause me to add people to accomplish things that I had not planned on and probably not even thought of earlier last year, and what I'm going to try to do is manage the very best I can not to exceed a 5,990 number, and I do that on a monthly basis.

Q. And that is something that as president you're authorized to do on your own without a vote or approval from any board?

A. Yes, sir.

Q. Since the meeting where you had the six

* * *

[Interoffice Correspondence of May 22, 1992, attached as Exhibit A Is Reproduced *supra* at pages 109 to 111.]

EXHIBIT C

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a rate increase by Florida Power Corporation.	:	DOCKET NO. 910890-EI

DEPOSITION OF:	John A. Hancock
TAKEN AT THE INSTANCE OF:	The Staff of the Florida Public Service Commission
PLACE:	Florida Power Corporation 3201 34th Street South St. Petersburg, Florida
TIME:	Commenced at 1:25 p.m. Concluded at 2:55 p.m.
DATE:	Monday, February 15, 1993
REPORTED BY:	Brian L. Boles, RPR Shorthand Reporter Notary Public State of Florida at Large

[2] APPEARANCES:

MICHAEL A. PALECKI, Staff Counsel, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Room 226, Tallahassee, Florida 32399-0863, Telephone No. (904) 487-2740, appearing on behalf of Florida Public Service Commission.

JAMES A. MCGEE, Senior Counsel, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

RICHARD W. NEISER, Senior Vice President, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

ALSO PRESENT:

JOHN SCARDINO, JR.

[3] INDEX

	Page No.
CERTIFICATE OF REPORTER	41
WITNESS:	
JOHN A. HANCOCK	
Examination by Mr. Palecki	4
Examination by Mr. Neiser	32
Examination by Mr. Palecki	39

EXHIBITS

Number:		Identified
1	Interoffice Correspondence dated 7/31/92	20
2	Interoffice Correspondence dated 8/12/92	20
3	Interoffice Correspondence dated 11/20/92	20

[4] JOHN A. HANCOCK

appeared as a witness and, after being duly sworn by the court reporter, testified as follows:

EXAMINATION

BY MR. PALECKI:

Q. Could you state your name and business address, please.

A. John A. Hancock. Business address, Florida Power Corporation, 3201 34th Street South in St. Petersburg.

Q. And what is your position with Florida Power Corporation?

A. Senior vice president, energy supply.

Q. And what are your duties and responsibilities?

A. The operation, maintenance, engineering, of all of our existing fossil plants, as well as construction of all new power generating facilities.

Q. Have your duties and responsibilities changed since the reorganization?

A. Quite significantly.

Q. And what has that change been?

A. The new responsibility is the construction of all future power generating [5] facilities. The omission from what I had before was the research and development function for the corporation, telecommunications, system protection and control, and energy dispatch.

Q. The reason we want to depose you today is that we wanted to ask you some questions about a goal to reduce the work force. I believe that was first made known to others on May 22nd, 1992, by Allen Keesler in a memo that was sent out. I wonder if you're familiar with that memo.

A. Yes, I am.

Q. Did you receive that memo in May?

A. Certainly.

Q. And what did you do in response? Did you take any action as a result of that?

A. Action in the context of beginning to formulate my thought processes about what should be done going forward.

Q. Did you speak to anybody?

A. Yes.

Q. Who?

A. Other senior officers; on several occasions to folks that reported directly to me.

Q. And what were – without reciting in entire words, what was generally the subject of [6] the conversation?

A. In the case of the senior staff, dialogue having to do with feasibility, how we might approach risks involved conceptually in terms of performing the entire corporation effort were we to go forward with that.

In the case of my direct reports, some were more pointed, as you might expect, that I shared with them my

portion of that challenge – our portion of that challenge conceptually and asked them to begin thinking about, you know, how we might go about that sort of thing.

Q. Were you on the PACE team that was responsible for discussing and working out this work force reduction plan or goal?

A. Yes.

Q. And when did the PACE team meet?

A. It was in late summer, early fall, September-ish, I think. I can't speak to you about specific dates.

Q. Could you give me just a brief history of the PACE team, how it came to be and what – what its functions were?

A. Mike, we – the strategic planning process that has been spoken to in earlier [7] depositions and earlier testimony and things saw us to look at a focus of where we were going as a company down the way. Allen's letter, of course, spoke to the desire to try our very best to compensate for that sort of strategic growth to hold the line on permanent manpower.

To answer the question specifically, the PACE team, I think, was a mutual effort to try to assess how we might go about something like that; in addition to that, to pool together our thoughts about challenges, difficulties, including difference of opinion with our boss, or whatever. And so that was a mutual effort to try to find the best way to go after the long-term objective here.

Q. When was the PACE team first put together?

A. I can't quote dates. I think it was, there again, in that late summer, September type of situation.

Q. Is the team still in existence today?

A. It was an informal type of get together. As that PACE team, we have not sat in session, if you will, in some considerable period of time.

Q. Do you expect to? Do you consider [8] yourself in –

A. Mike, lots of things have changed, including Mr. Neiser speaking to my very significant changes of responsibility. Our whole reorganization of this company, the – the process improvement activities that we're going through, which is referred to as our OD phase two, which we know a whole lot more about now than we did in the September, fall time frame, those are the things that we are giving our attention to.

I'm trying to get a new area of the responsibility in the company in the most efficient way that I possibly can.

Q. Now, I – phase two, is that part of the BPI program?

A. Business Process Improvement?

Q. Business Process Improvement.

A. I think so.

Q. But you used the different three letters. What did you call it?

A. OD phase two?

Q. What is OD?

A. Organizational design.

Q. Design.

A. Same words. Those were the original [9] words in our strategic plan. I apologize for the different buzz word.

Q. Well, tell me about – just briefly about phase two and how – how was it put together? Was this part of the planning process that you used an outside consultant to work up? Let's see. It was the Ernst & Young Company, or is this not related to the Ernst & Young staff?

A. Ernst & Young was involved in the Business Process Improvement exercise, including, of course, the early organizational design that led to the president's reorganization of the company.

Ernst & Young were evaluated, along with a number of other outside firms that might be able to bring insights in approach and those types of things to helping us to become more efficient, more competitive in today's world, if you would, and they began with us fairly early on in 1992, but, again, focused primarily on looking at the organization as a whole about where we best aligned from the standpoint of the president's strategic business units, if you will.

And we spent much of 1992 in pursuit of that activity, and, of course, that was culminated [10] in December of 1992 when the president announced new organization, which was made effective on the 1st of January.

That same effort began to formulate, and as a result of the process that they used in helping us to see how the

company should be better organized, the matter of looking at efficiencies and process improvements in the organizational units and major functions in the corporation, that has been a learning curve for all of us because it was a process that that consultant brought in by way of their experience from the outside.

I would tell you that as we got past the president's reorganization, particularly in the January time frame up until now, we have learned a very great deal more about the Business Process Improvement and the very pointed systematic effort it will incur over a number of years to help us to examine places in the corporation where we can become more efficient. So it's been an evolutionary process.

Q. The reason I ask is you're either the second or third witness today who said we're just – we know a lot more about phase two now than we did back then, and we're still learning about [11] phase two.

I guess what I'm trying to get at is when you talk about phase two, is this part of a program that Ernst & Young has put in effect? Is this part of a program that the company has developed on their own? Has it been a team program? I guess what I really want to get at is why didn't anyone know about phase two back in November? Why do you just know about it now?

A. Mike, I think that it's – I don't think, you know, that –

Q. Who developed phase two? Who invented it?

A. The strategic planning effort that we incurred that we did an update on early last year, about a year ago,

identified that we needed to go through first a look, as the president had, with major pieces of the corporation together properly, and once that's done, the fine structure that goes under that, and we identified conceptually those things being phase one and phase two. And so those were integral parts to our strategic plan.

The thing that makes it evolutionary, that tends to be evolving to all of us is that the total quality movement in the world is a rapidly [12] evolving thing, about the Baldridge award and those kinds of things, and so we thought that we had better get some outside folks in here to help us to be apprized of the best techniques that were available about making our company more efficient, and so that's why we got Ernst & Young.

And they helped us to – with the approach, they helped us in the evolution of this activity, but they brought some perspectives to this company in the way of their international efforts that we did not have.

And my – my opinion about – I think we all understood clearly phase one; we needed to get the president's direct report pieces together. That one was more or less blocking the way. But the phase two thing was a bit less clear, and it has been through getting past major organizational changes and really being able to more clearly focus on that area has begun to emerge that process and the very systematic approach that they would work with us to go through.

So I think it's a matter of a learning curve for a management team that wants to outreach to new techniques, candidly.

Q. Now, you're familiar with this Power [13] Lines publication which came out in November where Mr. Keesler announced that there wasn't any layoffs, but that there was still a goal to reduce the work force by 200. Certainly your CEO would have had knowledge of phase two in November of 1992.

A. Probably no more to the extent that any of the rest of us had in terms of the emerging perspective that Ernst & Young would bring to us really in the early part of this year.

Q. So phase two was to some great extent partly the – or it was Ernst & Young that brought that idea to the company?

A. Some new perspective about how to get that job done.

Q. Now, tell me about the discussions that you had when you were in the PACE team. What was discussed at the various meetings that you had?

A. Impact on employees' morale, degree of risk to our productivity and the performance of our core business, consideration of better identifying employees who were not fully carrying their weight; I think emphasis on the point of are there things that we are doing that perhaps in today's climate don't bring value added, and how [14] might we deal with those. Conceptual things about how a manager might go about retaining the high level of performance that represents our standard here but be able to perhaps go after that sort of thing with lesser or greater a head count.

I might add too that head count in terms of regular employees does not always imply no employee of any kind as the substitute. It can be a contractor or whatever the case may be.

So we talked about concepts, approaches, feasibility, those kinds of things in terms of testing out with each other how we might go about making this longer-term achievement.

Q. Now, you've seen the September 21st memo from Mr. Phillips with the attached breakdown –

A. Certainly.

Q. – of the – of the various areas where the breakdown was allocated.

A. Yes.

Q. In this letter, it was – he was quite specific, and he said, attached for your information is a breakdown of the position reduction targets by functional area. As you can see, these are proportioned across all areas, and these numbers are the results of an agreement [15] among the senior officers for all areas to bear a part in absorbing the strategic plan position increases. He indicated reductions are to be accomplished by January 1, 1994. Are to be accomplished.

At that time in September when you were discussing these, these were fairly firm at that time; were they not?

A. Yes, in the context of we had agreed in concept as a senior management team, the matrix there, that I had my portion to work on, and others did their portions to

work on. Conceptual from the standpoint of what we wanted to go after.

The key piece of that, though, is the substantive hum [sic] work that would have to go on in looking at the real people and the real functions and all of that sort of thing to really begin to make happen those kinds of reductions.

The major difference with a – with senior staff making some conceptual agreement in principle, a pardoning agreement, this is what we want to try to go do together, but I think a qualifier that says when we get down to the substance of this sort of thing, we have to look [16] at our role and our mission, the achievability of it.

And one thing is important to know, Mike, that a senior executive, A, has to be in position to say, I'm going to work on those kinds of things, but, at the same time, we always have the obligation and our duty to our employees and our president and others to be able – if we get to the point where things look difficult, impossible, imprudent, or whatever the case may be, to go back and to challenge a given situation like this.

So, commitment, yes. Pathway irreversible, absolutely not.

Q. As far as the commitment and the actual numerical goals that are stated here, did you feel pressure because of that as far as –

A. Pressure is the wrong word. No.

Q. What would the right word be?

A. Obligation, partnership, wanting to do my part, wanting to do the right thing.

Q. Are these numbers still a reality today?

A. (Shakes head.)

Q. And what has happened –

MR. NEISER: Answer the question, John.

[17] THE DEPONENT: No. I'm sorry. I apologize.

BY MR. PALECKI:

Q. What has happened since September 21st, 1992, that has – that has changed that? Has there been specific meetings, has there been a report where this has been withdrawn? What has happened to – to cause the change?

A. Very specifically, very much increased emphasis in time spent supporting the president's efforts to deal with phase one, which was the reorganization of the company. Senior staff increasingly involved in that activity until he made his decision in early December, a major effort that took away from specific consideration of that. That's piece one.

Q. And when you say when he made his decision in early December, what are you referring to?

A. The announcement of the reorganization of the corporation –

Q. Okay.

A. – at that point in time, which put me, as I have described previously, with major changes in responsibility for which I felt significant [18] obligation to focus on almost singularly.

In addition to that, the next significant thing was once that decision having been made early January, in particular, where I had assigned people and others had assigned people into the Business Process Improvement activities, I think at that point in time, the real emergence of the significance and substance and approach of that process, the – those two events in terms of my piece of a spreadsheet for an entirely different organization became background material; that in light of these new developments was a continuing and ongoing mandate for efficiency and looking for ways to make our business more efficient, but certainly diverted from a specific number, because we've got all these other things to sift through this year that have happened, and with the evolution of these new approaches.

Q. In the notice of deposition for today, there were several – or kind of a laundry list of documents, that we asked you to bring virtually anything you've been involved in concerning work force reduction. Did you bring any documents with you today?

A. These.

* * *

EXHIBIT 2

[LOGO] Florida
Power
Corporation

INTEROFFICE CORRESPONDENCE

Financial Services	A8C	231-4200
Office	MAC	Telephone

SUBJECT: Position Vacancies

TO: K. E. McDonald
J. Scardino, Jr.
S. Watsey
R. C. Conner, Jr.
J. T. Pollard
K. H. Wieland

DATE: August 12, 1992

In Allen Keesler's letter of May 22, 1992, to Organizational Design participants, he outlines his goal that "the Company have the same number of employees by January 1994 as it had in January 1991."

To assist us in accomplishing this goal, we will take the following action.

1. It is my intention to approve no net new positions in Financial Services between now and January 1994, except for positions in Information Services directly involved with projects identified on the Strategic Plan. Any net gains due to position transfers from outside Financial Services must be made up with a position abolishment in the area the position came from.

   If we have a non-strategic need that is so significant that it requires adding a net new position, we will abolish an approved position elsewhere in Financial Services.

2. To ensure that we fill vacancies only where necessary, I am asking that each of you personally review and approve the filling of such positions before they are publicized internally on the Position Opportunities Bulletin.

3. If you identify any opportunities to achieve organizational improvements through abolishing positions, broadening spans of control, reducing levels, or eliminating work, we should discuss these for immediate implementation rather than waiting until the conclusion of the Organizational Design process.

GEG/tpf

cc: A. J. Keesler, Jr.
M. H. Phillips
P. M. Beard, Jr.
J. A. Hancock
D. L. Miller
R. W. Neiser

EXHIBIT D

INTEROFFICE CORRESPONDENCE

Construction/Operations (Office) | A8B (MAC) | _____ (Telephone)

[LOGO] **Florida Power CORPORATION**

SUBJECT: Manpower Reduction

TO: W.L. Barron, Jr.
J.B. Case
P. Dagostino
P.C. Henry
W.J. Howell

DATE: September 21, 1992

Attached for your information is a breakdown of the position reduction targets by functional area. As you can see, these are proportioned across all areas. These numbers are the result of an agreement among the Senior officers for all areas to bear a part in absorbing the strategic plan position increases. The indicated reductions are to be accomplished by 01/01/94.

In addition, a second set of reductions are geared toward the organizational design process and are to be accomplished by 01/01/95. At this time the target number is 86 overall with no departmental allocation. Taken together, both of the above will meet a revised objective of returning to the 01/01/91 position level by 01/01/95. Of course, what is not provided for in the above is the fact that we will also have to absorb additional positions related to normal growth in activity levels during this time period.

Each of you should continue to work to reduce your own authorized position complement utilizing the tools we discussed at our staff meeting. I plan to discuss individual objectives with you soon.

/s/ Maurice H. Phillips
Maurice H. Phillips

dh

Attachment

[Illegible] AUTHORIZED [ILLEGIBLE]

	EXEC	LEGAL FIN GOVT SFRN		NVC CONST/ OPERATIONS		ADM SFRN	POWER OPER	TOTAL
BASE 1/1/91	2	90	604	839	2784	322	1113	5754
DEPT. TRANSFERS	–	(17)	15	(1)	–	15	(4)	8
CHANGES IN SUPE	–	–	5	–	–	–	10	15
STRATEGIC PLAN	–	6	69	–	138	–	–	213
NEW BASE	2	79	693	838	2922	337	1119	5990
REDUCE 2.5%	–	(2)	(17)	(21)	(73)	(9)	(28)	(150)
01 GOAL 1/1/94	2	77	676	817	2849	328	1091	5840
BALANCE 02 1994 TO BE DETERMINED BY 01 AD PROCESS								(86)
GOAL 1/1/95								5754

EXHIBIT E

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a rate increase by Florida Power Corporation.	:	DOCKET NO. 910890-EI

DEPOSITION OF: Maurice H. Phillips

TAKEN AT THE INSTANCE OF: The Staff of the Florida Public Service Commission

PLACE: Florida Power Corporation 3201 34th Street South St. Petersburg, Florida

TIME: Commenced at 11:40 a.m.
Concluded at 12:35 p.m.

DATE: Monday, February 15, 1993

REPORTED BY: Brian L. Boles, RPR
Shorthand Reporter
Notary Public
State of Florida at Large

[2] APPEARANCES:

MICHAEL A. PALECKI, Staff Counsel, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Room 226, Tallahassee, Florida 32399-0863, Telephone No. (904) 487-2740, appearing on behalf of Florida Public Service Commission.

JAMES A. MCGEE, Senior Counsel, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

RICHARD W. NEISER, Senior Vice President, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

ALSO PRESENT:

JOHN SCARDINO, JR.

[3] INDEX

	Page No.
CERTIFICATE OF REPORTER	44
WITNESS:	
MAURICE H. PHILLIPS	
Examination by Mr. Palecki	4
Examination by Mr. Neiser	34
Examination by Mr. Palecki	40

EXHIBITS

Number:	Identified
(None)	

[4] MAURICE H. PHILLIPS

appeared as a witness and, after being duly sworn by the court reporter, testified as follows:

EXAMINATION

BY MR. PALECKI:

Q. Could you please state your name and business address.

A. Maurice H. Phillips, Florida Power Corporation, 3401 34th Street South, St. Petersburg, Florida.

Q. And what is your position with Florida Power Corporation?

A. I'm executive vice president of the company.

Q. And what are your duties and responsibilities?

A. My duties as executive vice president include our field divisions, our energy conservation programs, marketing, and support services for those.

Q. Have your duties or responsibilities changed since the recent reorganization or restructuring?

A. Yes, they have.

Q. In what way?

[5] A. Prior to the reorganization, I had my current duties, as I just outlined. In addition, I had responsibility for generation, transmission substation construction and system planning.

Q. And who handles those areas now?

A. The generation construction area is under John Hancock, senior vice president. The transmission substation construction and system planning area is under Phil Henry, senior vice president.

Q. The reason we wanted to depose you today is to ask you some questions about a goal to reduce the work force that apparently was first mentioned in a May 22nd, 1992, memorandum that was signed by Allen Keesler.

I hand you a copy of that memorandum and ask you if you're familiar with that.

A. Yes, I have read this memorandum.

Q. And did you receive that back in May of 1992?

A. Yes, I did.

Q. And in response to that memorandum, did you take any action or do anything?

A. I followed up the receipt of this memorandum with discussions with my own staff and [6] discussions with my fellow senior officers, yes.

Q. And were these informal discussions, or were they actually meetings that you called?

A. No, they were informal discussions that were held with my – with my staff. I have a number of direct reports, and discussions with them usually take place on an individual basis.

Q. And what were those discussions after you received the memo?

A. Well, discussions along the lines of our ongoing efforts to be a very efficient organization, to be conservative about our use of all resources, and manpower included, and discussions about how we might, you know, approach some objectives, goals, that were outlined in Mr. Keesler's memo.

Q. And who did you discuss this with?

A. Well, my direct reports at the time – and this, of course, goes back to last year prior to the reorganization – were Mr. Phil Henry, Mr. Wally Barron, Pete Dagostino, Janice Case, William Howell. Those were my direct reports at that time.

Q. And as a result of that memo, was there a task force or a, what was referred to as the [7] PACE team, established?

A. There was a senior – well, there is a senior officer PACE team. I would not relate that that was established directly as a result of this memo, but we have an ongoing PACE team of the senior officers, yes.

Q. Was it first formed after that memo took place, or was it something that was already in – already in effect and force?

A. It was already – something that was already in place, yes.

Q. After this memo came out, was the PACE team – was this one of the matters that was discussed by the PACE team?

A. Yes, it was.

Q. Did it become an area of focus for you?

A. For the PACE team, yes.

Q. Do you recall when the – after you received the memo, did you – apart from just conversations and discussions that you had with your reports – did you have a meeting or meetings regarding work force reduction?

A. On that subject?

Q. Yes.

A. No, I did not.

[8] Q. Did you when the PACE team got together?

A. Yes. Those were the only meetings that that topic was a discussion topic, yes.

Q. And when did the PACE team discuss this?

A. I don't recall specific dates. Our PACE team is ongoing. We address, you know, issues that come up at our level. So it was – it was several meetings ongoing. I don't recall the specific dates of those meetings.

Q. And what was discussed?

A. Well, we discussed the issue of how we might address the memo. You know, we viewed the memo as our president setting a tough objective or goal really in line with our continuing efforts over several years and certainly in the future of trying to be a very efficient organization.

So we talked about, you know, what were the tools that we might be able to utilize to – to respond. We talked about whether or not this memo even outlined something that was practical or possible to accomplish, and we had some very – I think some very frank discussions about that.

Q. Now, you sent a memo of your own on September 21st; is that correct?

A. That's correct.

[9] Q. And is this to the rest of the members? I notice this is to Barron, Case, Dagostino, Henry and Howell.

A. Yes. Those were my direct reports at the time.

Q. And this is a breakdown of the position reduction targets that you attached to this. Is that something that you actually worked up yourself? Is that your handwriting?

A. No, that is not my handwriting.

Q. Do you know who did actually do the workup?

A. I think the one who put that to paper is – was George Greene, yes, sir, senior vice president.

Q. And did that occur at one of the PACE team meetings that this was put together?

A. That was a culmination of several discussions. So, you know, it was not the work product of any one meeting, as I recall. We had been discussing the whole issue of how to address the memo, how to try to give our – our people in our various departments some direction in the ongoing efforts to be a very – you know, a very conservative organization.

* * *

EXHIBIT F

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for a rate increase by Florida Power Corporation.	DOCKET NO. 910890-EI

DEPOSITION OF: George E. Greene, III

TAKEN AT THE INSTANCE OF: The Staff of the Florida Public Service Commission

PLACE: Florida Power Commission
3201 34th Street South
St. Petersburg, Florida

TIME: Commenced at 3:35 p.m.
Concluded at 4:35 p.m.

DATE: Monday, February 15, 1993

REPORTED BY: Brian L. Boles, RPR
Shorthand Reporter
Notary Public
State of Florida at Large

[2] APPEARANCES

MICHAEL A. PALECKI, Staff Counsel, Florida Public Service Commission, 101 East Gaines Street, Fletcher Building, Room 226, Tallahassee, Florida 32399-0863, Telephone No. (904) 487-2740, appearing on behalf of Florida Public Service Commission.

JAMES A. MCGEE, Senior Counsel, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

RICHARD W. NEISER, Senior Vice President, Florida Power Corporation, Post Office Box 14042, St. Petersburg, Florida 33733-4042, Telephone No. (813) 866-5184, appearing on behalf of Florida Power Corporation.

ALSO PRESENT:

JOHN SCARDINO, JR.

[3] INDEX

	Page No.
CERTIFICATE OF REPORTER	41
WITNESS:	
GEORGE E. GREENE, III	
Examination by Mr. Palecki	4
Examination by Mr. Neiser	34

EXHIBITS

Number:		Identified
1	Extrapolation from pocket calendar of George Greene	7
2	Position Complement dated 7/92	14
3	Authorized Positions Corporate Wide	15
4	Note to Seniors dated 10/22/92	17

5	Senior Management Complement Report	18
6	Interoffice Correspondence dated 7/31/92	20
7	Interoffice correspondence dated 7/29/92	21
8	FPC Employee Growth Statistics	24
9	Position Complement Report dated 1/91	25
10	Position Complement report dated 6/92	26
11	(Late filed) Date funds were transferred and amount of transfer	34

[4] GEORGE E. GREENE, III,

appeared as a witness and, after being duly sworn by the court reporter, testified as follows:

EXAMINATION

BY MR. PALECKI:

Q. Please state your name and your business address.

A. George, middle initial E, Greene, III. Business address, Florida Power Corporation, St. Petersburg, Florida.

Q. And what is your position?

A. Senior vice president, office of the president.

Q. And what are your duties and responsibilities?

A. I am responsible in that position for the company's strategic planning efforts and for our organizational design efforts.

Q. Are you familiar with a memo dated May 22nd, 1992, from Allen Keesler where the idea of a goal to reduce the work force was discussed?

A. I am.

Q. And were you subsequently part of the PACE team that discussed work force reduction between May and October of 1992?

[5] A. I was.

Q. Could you just briefly explain what the PACE team discussed and when they met?

A. I certainly can. May I refer to my notes?

Q. Yes.

A. There were – I served as PACE team leader. We had three meetings. The first meeting was August the 11th. At that time, the essence of the discussion, as I recall it, was a feeling that the goal set in the letter of May 22nd was not really a realistic goal, and was not interpreted by us as an order but merely an expression of Allen's concern about growth.

At the second meeting, which was held on September 1st, the seniors talked about what we thought might be an achievable goal, and we agreed to propose to Allen a goal of two percent reduction in positions, which would be 120 positions.

It happened that Allen actually came into that meeting – he was not a member of the PACE team, but he came to that meeting – and after some discussion, he revised that goal to two-and-a-half percent, or 150 positions as a goal [6] for possible position reduction in 1993, and until that time, the goal of 150 had not existed.

The – then at the third meeting, I handed out the work sheet that you have in front of you there, of which I have the original here, which attempted to reflect various changes in departments since 1/1/91, because that was the base Allen had used in his letter, and to show how those would provide a revised base on which – to which we would apply the two-and-a-half percent.

Q. I notice that you've brought numerous documents with you. We did ask in the notice of deposition that you bring any documents, notes, memos, et cetera, related to work force reduction. I wonder if we can just go through those, and if you could explain what they are and what they say.

A. Yes.

Q. If there are anything that you think is confidential or you would like to discuss with your attorney beforehand – earlier in the day we had things where specific names and job titles were mentioned, and we – if there's anything like that, you can just consult with your attorney, and we can go off the record for a while.

[7] A. Thank you. Would you like me to go through the file point by point?

Q. Yes.

A. All right.

Q. I think that would probably be best. I notice that the first thing was some notes as to when the meetings were, and basically it was a brief summary, I guess, as to what was discussed. Could we go ahead and introduce that as an exhibit.

A. You certainly may. It was simply an extrapolation from my pocket calendar of last year, and I was trying to put in context various occurrences: Allen's letter, the rate case hearings, and then the three PACE team meetings, and if you wish to introduce that, you may do so.

MR. PALECKI: We'd like to go ahead and have that marked as Deposition Exhibit 1, and we'll just put all of the Greene exhibits there that we want to have introduced in the deposition.

MR. MCGEE: Mike, I think one point that we ought to make sure that we're clear on is that I believe I understood Mr. Greene to say that that was not prepared at the time of the other [8] documents. It was prepared for the deposition.

MR. PALECKI: Yes, I understand.

THE DEPONENT: That's correct. I just did that last week for the deposition, to organize my own thoughts.

MR. PALECKI: But it would be nice to have something that sets it all out on one page.

MR. MCGEE: Right.

THE DEPONENT: As I mentioned, I was the PACE team leader of that PACE team, which had been

established several years before. And so what I have here is my desk file. In fact, it's labeled "Senior PACE." We used a flip chart, and in the process of making notes, I tore those off and saved them in the file.

So I've got general discussion from the first meeting where we were concerned about the goal established earlier, and indicated that we did not concur with it. We felt that – that achieving it would adversely impact the company and service to customers.

I have here a flip chart where we talked about possible goods and services that we might eliminate, things that we were saying, Well, could we just cut those out? None of that has come to

* * *

Daily News Clips Date 11-11-92
Provided by the Office
Public Information
(904) 488-0733

Publication – ST. PETERSBURG TIMES

Page Number E1

Florida Power to reduce ranks; no layoffs planned

By ALAN GOLDSTEIN
Times Staff Writer

ST. PETERSBURG – Florida Power Corp., aiming to trim costs as competition heats up the electricity generating industry, plans to reduce its work force by about 200 jobs by the end of next year.

"There are no layoffs on schedule," Florida Power spokesman Will Rodgers said Wednesday. "We're going to try to bring the level of the work force down by 200 positions by the end of 1993. We plan to do that through attrition."

Florida Power, the main subsidiary of St. Petersburg-based Florida Progress Corp., employs 5,700 people. The company serves 1.2-million customers in 32 counties in parts of Central and North Florida.

Rodgers said the company typically posts several hundred jobs a year.

He said executives have indicated it would not be difficult to reach the goal of 5,500 employees through attrition.

"All of this is in preliminary stages," Rodgers said. "If at the end of 1993 we're not at the goal, we would revisit whether we would get down to that number through layoffs. We don't plan on any and hope not to have any."

Allen J. Keesler Jr., the company's president and chief executive, is planning a general reorganization over the next six to twelve months to make the company stronger, Rodgers said.

"This is one of the things being looked at," Rodgers said.

Increasingly, utilities are being forced to act more nimbly as once-captive industrial customers abandon their conventional sources of power and find new ways to operate their plants.

• **MODEM BUILT FOR SPEED.** AT&T Paradyne in Largo announced Tuesday it has developed a modem that can operate at the world's fastest transmission speed – 28,800 bits per second. The new speed doubles the current standard of 14,400 bps. New products are expected to be available in the second half of 1993, according to a statement from the unit of American Telephone & Telegraph Co.

Publication – TAMPA TRIBUNE Date 11-11-92
Page Number [Illegible]-1

Utility to prune 200 jobs

By FRANK RUIZ
Tribune Staff Writer

ST. PETERSBURG – The state's second-largest electric utility, St. Petersburg-based Florida Power Corp., plans to cut 200 jobs, or 3.5 percent of its staff, as part of a realignment to reduce costs, officials confirmed Tuesday.

Fla. Power

Close	Chg.
31 3/8	-5/8

"We want to reach [the goal] by the end of 1993," said spokesman Will Rodgers.

The FPC realignment, viewed as a competitive action by analysts, will cut across the board and include hourly, salaried and some managerial jobs.

Details of Florida Power's plan are sketchy at the moment and no public announcement has been made. The company has not projected the expected savings the action would yield.

However, rumors of layoffs have been circulating among employees within the company's 320 county territory. Florida Power employs 5,718 people.

The company's president, Allen J. Keesler, Jr., issued an internal statement Monday to the staff briefly outlining the company's plan.

"It's a fact of life that ultimately someone might have to be displaced but our goal is to reshape the company without layoffs," Keesler wrote.

He added that if voluntary reductions through attrition and early retirements don't work, layoffs will be considered.

The planned reduction falls in line with what some other large utilities across the nation are doing to improve earnings in a mature industry with limited growth prospects.

"I think it's just an overall attempt to make sure the organization remains competitive," said Leonard Hyman of Merrill Lynch Global Securities Inc. in New York.

Some large utilities such as Florida Power have been examining methods to keep commercial rates down in light of growing competition from independent and municipal power companies and pressure from government regulators.

"It's not unthinkable that in the near future a large [customer] might buy its electricity elsewhere or even generate it itself," Hyman said.

Nathan Partain, a Duff & Phelps analyst agrees that utilities are and should be cutting costs as one measure to keep rates down.

"Everybody is having to pull up their belts," Partain said.

With more than 1.3 million customers, Florida Power ranks second only to Miami-based Florida Power & Light Co. in size.

The company provides electric service in areas ranging from Pinellas to Orange counties and in parts of Polk, Pasco, Manatee, Citrus, Hernando, Marion and other counties.

The job-cutting is likely to be received with some surprise locally, said Gary Hovis of Argus Research in New York.

"This is a drastic move in an industry where job security is expected," he said.

Publication – ORLANDO SENTINEL Date 11-12-92
Page Number D1

Florida Power to reduce staff by 200

[ ] 'Our goal is to reshape the company without layoffs,' says the president of the electric utility.

COMPILED FROM STAFF AND WIRE REPORTS

ST. PETERSBURG – Florida Power Corp., the state's second-largest electric utility, plans to cut 200 jobs by early 1994, a company spokesman said Wednesday.

The goal is to reduce staff by 3.5 percent as part of a realignment to shave costs, said Will Rodgers. The utility, based in St. Petersburg, employs 5,718.

Florida Power has more than 1.3 million customers in a 32-county service area, including 412,000 in Central Florida, and is second in size to Florida Power & Light Co., based in Miami.

The FPC realignment, viewed as a competitive action by analysts, will cut across the board and include hourly, salaried and some managerial jobs.

President Allen J. Keesler, Jr. issued an internal statement Monday briefly outlining the plan.

"It's a fact of life that ultimately someone might have to be displaced but our goal is to reshape the company without layoffs," Keesler wrote.

He added that if voluntary reductions through attrition and early retirements don't work, layoffs will be considered.

Company officials said no final decisions have been made on where the cuts might be made. "No specific locations have been announced. We'll look at the situation company wide," said Karen Raihill, a company spokesperson in St. Petersburg.

The work force reduction is designed to have the company's total employment on Jan. 1, 1994, be the same as on Jan. 1, 1991, Raihill said. The company employs about 1,500 in Central Florida.

The planned reduction falls in line with what some other large utilities across the nation are doing to improve earnings in an industry with limited growth prospects.

"I think it's just an overall attempt to make sure the organization remains competitive," Leonard Hyman of Merrill Lynch Global Securities Inc. in New York, said Tuesday.

Some large utilities such as Florida Power have been examining methods to keep commercial rates down in light of growing competition from independent and municipal power companies and pressure from government regulators.

"It's not unthinkable that in the near future a large customer might buy its electricity elsewhere or even generate it itself," Hyman said.

FPC provides service in areas from Pinellas to Orange counties and in parts of Polk, Pasco, Manatee, Citrus, Hernando, Marion and other counties.

Jerry Jackson of the Sentinel *staff contributed to this report.*

EXHIBIT G

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES AKIN, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, et al.

Defendants.

CASE NO.
97-173-Civ-Oc-10C

WANDA L. ADAMS, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Defendants.

CASE NO.
95-123-Civ-J-10A

AFFIDAVIT OF PATSY YEATES BAYNARD

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned officer, duly authorized to administer oath, appeared PATSY YEATES BAYNARD well known to me who upon oath says and deposes as follows:

1. My name is PATSY YEATES BAYNARD, and I am over the age of eighteen.

2. I am a former employee of Florida Power and was employed with Florida Power from July 1975 until the time of my termination on December 1995 for a total of 20 years.

3. During my 20 years of service at Florida Power I held the following positions:

    a. Director, Research and Development 1993-1995
    b. Manager, EHV Project – 1990-1992
    c. Director, Environmental and Licensing Affairs – 1984-1990
    d. Special Assistant to Senior Vice-President, Engineering Services – 1983-1984
    e. Assistant to Vice-President, Nuclear Operations – 1982-1983
    f. Manager, Nuclear Support Services, Nuclear Operations – 1978-1982
    g. Nuclear Support Services – 1975-1978

4. During 1990 through 1992, as manager for the EHV Project, I worked for Phil Henry, Senior Vice-President of Engineering and Construction. As a manger of the EHV Project, I attended the staff meetings. During this time, Florida Power was offering "early retirement" packages to employees in their 50's. During the staff meetings, Mr. Henry stated on more than one occasion that if we knew anyone who had been offered the "early retirement" that we should encourage them to take it; because those employees who did not take the "early retirement" would probably be victims of the downsizing. Mr. Henry indicated that

an early retirement package would be offered providing for insurance coverage of spouses to entice older employees to take advantage of this option, stating future early retirement packages would not be as good and would not provide for insurance for spouses.

5. During late 1992 and 1993, Florida Power was engaged in what they described as "downsizing". During this time, I was a member of the Strategic Planning committee which also included Richard Korpan, Executive Vice-President, Florida Progress Corporation; Patricia Blizzard, Director of Environmental and Licensing Affairs; Susan Johnson, Director of Strategic Planning; Allen Keesler, John A. Hancock, Richard Neiser, Joseph "Joe" Cronin, Maurice Phillips, Phil Henry and George Green all Senior Officers of Florida Power Corporation. Mr. Korpan, Ms. Blizzard and Mr. Neiser were also known to be attorneys.

6. As part of the preparation for the Strategic Planning process, a statistical evaluation was completed of the workforce to correlate age, years of service, cost of benefits and liabilities at the time of retirement. This evaluation and the stated desire to provide career opportunities, management growth, and get rid of older employees who were set in their ways resulted in the impetus for downsizing. It was stated that the thrust was not to reduce the number of employees but to put together a plan that would get rid of older employees, reduce costs and bring younger employees into the workforce. At this time, Dick Neiser, George Green and Joe Cronin were asked to take an "early" retirement. Their leaving made way for the younger employees.

7. As early as 1992, during one of the Strategic Planning meetings, Susan Johnson stated that Florida Power's

older employees were the targets for the Reductions-in-Force.

8. During the numerous monthly Strategic Planning meetings that I attended, the decision for a company-wide "downsizing" was discussed and decided upon. During a meeting at Howey-in-the-Hills, Florida, Mr. Korpan stated that "if employees had been with the company over five years, they were part of the problem rather than the solution to meet the competitive needs of the future". He also indicated that Florida Power needed to "get rid of the older people" and stated that "older people had nothing to contribute to the corporation." It is my personal knowledge that the decision to "downsize" was unequivocally directed from the highest levels of management of Florida Progress and Florida Power, and specifically, Mr. Korpan, Vice-President of Florida Progress Corporation directed Florida Power's Senior Management to implement the "downsizing" through directives to lower levels of management.

9. I am further aware that the Information Services Department (also referred to as Information Technology) was ordered to reduce its staff by 58 people. *See Exhibit A page 46 & Exhibit B, page 49 of Florida Power's 1994-98 Strategic Plan.*

10 Although I am not aware of each and every one of the directives, Senior Management issued the directives as to how to carry-out the "downsizing". Mr. Miller directed me to "get rid of one-half" of the people in my department. I am personally aware that Senior Management did set goals and/or targets for the "downsizing" as discussed in Florida Power's 1994-98 Strategic Plan and of which I was a participant.

11 During the Strategic Planning meetings, Mr. Korpan and Ms. Blizzard routinely issued directives to Florida Power regarding minute management details which were then carried out by Florida Power's Senior Management.

12 During the Strategic Planning meetings everyone was instructed by Ms. Blizzard not to take notes and to never put any of the issues discussed during the meetings in writing.

13 After one of the Strategic Planning meetings, Pat Blizzard told Dave Miller, in my presence, that the Career Transition Agreement, which was to be offered to persons being terminated, had no real legal basis, but it would "ward off" litigation. Frequently during the Strategic Planning meetings, Senior Management emphasized the need to handle the Reduction-in-Force in a manner so as to avoid litigation.

14 By August, 1995, after the lay-offs which primarily targeted employees over the age of forty, I personally observed that the "older" male employees in Marketing and Energy Services Sections of the Energy Distribution Business Unit had "dyed" their hair to hide the "gray" thus creating Florida Power's corporate culture. I also observed that a number of other senior managers in other parts of the organization were beginning to "dye" their hair to hide the "gray".

15 Although there was much discussion by senior management in general, and Dave Miller specifically, that Florida Power needed people with the "skill sets for the future", there was never given or discussed what the definition of those skill sets included.

16 In the Fall of 1995, I attended a Florida Progress meeting attended by the first three levels of Senior Management of Florida Progress and Florida Power which was held at Innsbruck [sic] Resort. The guest

speaker at this meeting, Judith M. Barwick, presented her ideas expressed in her book *Danger in the Comfort Zone: From Boardroom to Mailroom – How to Break the Entitlement Habit That's Killing American Business.* At this meeting, Mr. Korpan openly expressed that Florida Power's "older employees" epitomized the "mentality of entitlement" and concluded that this is why we need to get rid of older employees.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Patsy Yeates Baynard
PATSY YEATES BAYNARD

SWORN TO AND SUBSCRIBED before me, by PATSY Y. BAYNARD who is either personally known to me or who had produced DRIVER'S LICENSE as identification, this 16th day of SEPT., 1998

/s/ Cheryl A. Scalzo
Notary Public, State at Large

My Commission Expires:

[SEAL] CHERYL A. SCALZO
MY COMMISSION # CC 732243
EXPIRES April 8, 2002
Bonded Thru Notary
Public Underwriters

EXHIBIT A

* * *

Florida Power Corporation 1994-1998 Strategic Planning
Page 46

2. Information Technology

Strategic Rationale

One of the two identified differentiation strategies necessary to attain FPC's mission and objectives is the exploitation of advanced information technology tools that create strategic competitive advantage. Central to this strategy is a shift from merely seeking existing problem areas that could be improved via more automation, toward a full recognition of the powerful potential inherent in information technology's ability to achieve entirely new end results. It is only through this aggressive use of information technology tools that FPC will be able to radically, not marginally, alter what we do and how we do it.

Definitions

For purposes of this Corporate Services Strategic Plan, ~~For purposes of this Corpco Strategic Plan,~~ and as indicated in the FPC Policy and Departmental User Manuals, information technology tools are defined to be all Corporate computer-related hardware, software, systems, networks (including voice, data, video, etc.), data, files and databases; whether purchased from third party vendors or developed by FPC personnel; irrespective of use, functionality, or location within FPC.

Specific Objectives

In order to achieve the four identified Corporate objectives related to market share/external customer satisfaction, financial results of operation, organizational design and flexibility, and overall cost reduction, specific objectives have been set for the Information Technology function. In summary, these objectives are to:

- Reduce headcount within the Information Services Department (ISD) by 58 people, or $1.6M annually, within one year via reorganizations, reengineering and new business alignments
- Achieve overall Corporate cost savings of $310 million within 10 years via the implementation of fully integrated strategic systems, developed through the strategic partnership with Andersen Consulting in the Solution Works joint venture. The savings break down as follows:
  - $100M Customer Service System
  - $150M Distribution Automation Systems
  - $ 60M Other Strategic Systems (9)
- Achieve computer operations cost savings of at least $14M within 10 years (post 1998) via the migration from a mainframe-centric technology architecture to an open system, client/server architecture based on the Unix operating system. Additional application specific cost benefits will be added

* * *

EXHIBIT B

* * *

Florida Power Corporation 1994-1998 Strategic Planning
Page 49

[Chart Omitted In Printing]

1. **Downsize Information Services**

   By December 31, 1994, Information Services will reduce its total resources by 58 positions from the 1993 level, which is a reduction of about 15%. This will be accomplished through elimination of vacancies, termination of unsatisfactory performers, the early retirement program, and the redeployment program. The result will be a flatter management structure with wider spans of control, centralization of overlapping functions, and re-engineered system development and maintenance functions in order to do more with less. For example, maintenance on major systems will be packaged into larger, less frequent releases, reducing overhead and enabling resources to be shared across more systems. This release process will also enable management to more effectively control maintenance costs by evaluating the costs and benefits of releases as they are planned and scheduled

2. **Information Services Joint Venture**

* * *

EXHIBIT H

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PATRICT BURKE,
ROBERT KESSLER,
DORINDA RODNEY,
JAMES SCALES, and
ARLENE SCHWEMMER,

Plaintiffs,

vs.

FLORIDA POWER
CORPORATION,

Defendant.
_____/

Case No.:
96-1184-CIV-T-26C

AFFIDAVIT OF CYNTHIA BEHRENS-BOGA

BEFORE ME, personally appeared the undersigned officer, duly authorized to administer oath, appeared CYNTHIA BEHRENS-BOGA, upon oath says and deposes as follows:

1. My name is CYNTHIA BEHRENS-BOGA, and I am a former employee of FLORIDA POWER CORPORATION.

2. For a number of years, from 1980 to approximately 1991, I was confidential secretary to the Director of the Quality Programs Department. During that time, I had approximately five bosses, the last being Bruce Hickle.

3. On two occasions, in 1986 and 1989, I was temporarily transferred to the Vice President of Nuclear Operations to cover for his confidential secretary when she was out on medical leave.

4. On those two occasions, I saw what was commonly referred to by the directors, managers and vice presidents as the "birthday book." The first time I saw this book in approximately 1986, it was a computer printout, bound in blue, which listed all employees, alphabetically, and gave their dates of employment, Social Security Number, salary and date of birth. In 1989, I saw another version of this list which had this information, together with the benefits each employee was being paid, including medical expenses and whether they had spouses or dependents.

5. As confidential secretary, I was required to attend various directors meetings to take notes. The birthday book was referred to often in these meetings as "the birthday book."

6. In November 1991, I transferred to the Quality Systems Department to get back out into the plant. At or about this time, Arthur Anderson and Company was conducting a survey of each employee and each position and among the things they used was the "birthday book."

7. We were told in staff meetings that Arthur Anderson was evaluating all workers.

8. In approximately 1990, I was given the birthday book to compile a list for the Quality Programs Department and as such, I re-typed the information from the

birthday book as it pertains to employees to the Quality Programs Department.

9. In 1989, all directors were given a copy of the birthday book and told to speak to the managers and supervisors under them to have the information verified and make sure that all people were accounted for on the book.

10. The birthday book was stamped "confidential." I was told to treat it as confidential information and told to lock it in my filing cabinet whenever I was away from my office.

11. The secretaries who attended the directors meetings to take notes, typed their notes and put them into a file after they were typed.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Cynthia Behrens-Boga
CYNTHIA BEHRENS-BOGA-
AFFIANT

STATE OF FLORIDA
COUNTY OF Citrus

SWORN TO AND SUBSCRIBED before me, by CYNTHIA BEHRENS-BOGA, who is either personally known to me or who has produced _____ as identification, this 11th day of December, 1997.

/s/ Debra L. Faul
Notary Public, State at Large

My Commission Expires:

[SEAL]
DEBRA L. FAUL
MY COMMISSION
#CC480471 EXPIRES
July 13, 1999
BONDED THRU TROY
FAIN INSURANCE, INC.

(14)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

JOINT APPENDIX
Volume II, Pages 192 to 416

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Petition for Certiorari Filed: October 3, 2001
Certiorari Granted: December 3, 2001

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TABLE OF CONTENTS

Page

VOLUME I

Relevant Docket Entries. 1

Order of Certification, December 11, 1996 7

Excerpts from Sixth Amended Complaint, August 27, 1997 17

Order on Pending Motions, June 19, 1998 . . . . . Brief in Opp. App. 1a

Exhibits A through I to Defendants' Motion to Decertify, August 7, 1998 30

Exhibits A through H to Plaintiffs' Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, September 30, 1998 . . . 108

VOLUME II

Exhibits I through S, and V to Plaintiffs' Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, September 30, 1998 192

Plaintiffs' Amended Response to Defendants' Motion to Decertify and Incorporated Memorandum of Law, October 7, 1998 296

District Court Order on Pending Motions, August 26, 1999 . . . . . Pet. App. 19a

District Court Order Certifying Interlocutory Appeal, October 27, 1999 . . . . . Pet. App. 28a

Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal, November 17, 1999 318

TABLE OF CONTENTS – Continued

Page

Opinion of Court of Appeals, July 5, 2001 .. Pet. App. 1a

The Older American Worker, Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, June 1965 350

EXHIBIT I

REDEPLOYABLE RESOURCES – FINAL – MAY 25, 1993

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:
  - Position reduction due to business process improvement.
  - Position reduction at holding company.
  - Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to quality for internal positions.
- Redeployable employees remain at current salary for up to six months or until one of the following occurs:
  - Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.
  - If voluntary termination, remainder of six month's salary paid.
  - As a result of placement process individual accepts internal job offer. If external job secured, remainder of six month salary will be paid.
  - Separation at six months after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:
  - A redeployable individual has to initiate application for job opening.
  - Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified to the present supervisor and supervisor's responsible Senior V.P.
  - If disagreement, goes to President for final review and decision.
- Redeployable employees remain in their department and in the department budget until "six months" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Where possible, unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.
- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.
- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.
  - Evaluate who is being declared redeployable.
  - Who gets job offers.
  - Who actually is released from Company.

- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY WRITTEN NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. DO DISCUSS WITH YOUR STAFF AND FEEL FREE TO ANSWER EMPLOYEE QUESTIONS. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

EXHIBIT J

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA L. ADAMS, et al., Plaintiffs, -vs- FLORIDA POWER CORP., etc., Defendant.	:	CASE NO. 95-123-Civ-Oc-10A
JAMES AKIN, et al., Plaintiffs, -vs- FLORIDA POWER CORP., etc., Defendant.	:	CASE NO. 97-173-Civ-Oc-10C
	:	Ocala Courthouse May 13, 1998 4:30 p.m.

TRANSCRIPT OF STATUS
CONFERENCE PROCEEDINGS
before
THE HONORABLE WM. TERRELL HODGES
United States District Judge

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[2] PROCEEDINGS

4:30 p.m. May 13, 1998

THE COURT: Good afternoon, counsel.

COUNSEL: Good afternoon, Your Honor (collectively.)

THE COURT: I apologize for the late commencement of this hearing. But as I think all of you observed, I'm involved at the moment in a jury trial, and I wanted to make maximum use of the jury's time, even at your expense.

We have a hearing scheduled in the case of *Adams and others against Florida Power Corporation*, et cetera, No. 95-123-Civil-Ocala, to consider the motion to dissolve the class as well as, I believe, all other pending motions. Let's start at least with that motion, which I believe is yours, Mr. Sapp. What is your position with respect to it?

MR. SAPP: Your Honor, there has not been a motion to decertify filed.

THE COURT: Pardon?

MR. SAPP: There has been no motion to decertify the class.

THE COURT: To decertify? I was misinformed. I thought we had a –

MR. SAPP: No, sir, there has not been. We anticipate at the appropriate time filing such a motion, but [3] there is not one pending at the current time.

THE COURT: Well, I obviously haven't had a chance to review this file in preparation for this hearing in the detail that I should, thanks to the pending case. But what matter is there before the Court then that requires consideration this afternoon?

MR. SCOTT: Your Honor, I think that we're here basically for a status conference, to find out where the case is. I think that what we need to take up with the Court today is to set a discovery deadline so that we can get this case moving.

MS. REYNOLDS: There are as well, Your Honor, a number of motions that are pending. There's a motion as to the second amended complaint to dismiss forward progress. I believe there's a plaintiffs' motion for summary judgment on the counterclaim. Defendant's motion for summary judgment on portions of the counterclaim as well. And there's a defendant's motion for summary judgment as to the time-barred claims of four of the plaintiffs in the case.

There are as well – I guess there are three as well uncontested motions that have not been ruled upon.

THE COURT: Well, it's obvious I need to give this case greater attention then.

Mr. Scott, how many plaintiffs have opted in to this case at the present time? Have you named them all in your [4] most recent amended complaint?

MR. SCOTT: We have, Your Honor.

THE COURT: And how many are there?

MR. SCOTT: Your Honor, there are currently 56 joined plaintiffs and there are 61 opt-ins, a total of 117.

THE COURT: 56 and 61?

MR. SCOTT: Yes, sir.

THE COURT: And what's the status of the running of the statute of limitations with respect to any other class members who have not opted in? Are you able to say?

MS. REYNOLDS: I guess the period for opting in closed in May of – it would be my guess that the statute of limitations has long since run.

THE COURT: Well, in other words, we have before us in these 117 plaintiffs the entire universe of plaintiffs who could now have a justiciable claim, at least within reasonable legal anticipation, I take it.

MS. REYNOLDS: Yes, Your Honor.

MR. SCOTT: Your Honor, out of this particular group of individuals, there were 556. I think 380-something actually were over the age of 40. And notice was sent to all of them.

The only ones who have opted in are the ones that are in it to date. I don't know any other way that these people could opt in to this case at this point, because they were [5] given a choice.

THE COURT: Well, I don't know that they would be required to opt in. We're talking about a Fair Labor Standard-type class, not a Rule 23 class. Right?

MS. REYNOLDS: They'd be required to opt in.

THE COURT: So as I recall a prior discussion we had, the statute of limitations would figure into the desirability of litigating the case as a class action more so than would otherwise be true, which is why I asked that question. I don't want to get started litigating a class of 117 people if it's not going to have a final preclusive effect and I have to do it all over again at some future date.

MR. SCOTT: Your Honor, I can tell you that from my best overview of the people that are involved in this, the ones that did not opt in would not be able to now get in, because they did not file with the EEOC. And I don't know how they could possibly do it. But I mean, I –

THE COURT: In other words, they're barred by limitations.

MR. SCOTT: Yes.

THE COURT: And we're dealing, as far as you're concerned, Mr. Scott, with the entire universe of those that would have a justiciable claim or viable claim remaining.

MR. SCOTT: Yes, sir. Under this particular program of reduction in force at Florida Power. There may be others [6] I don't know about.

THE COURT: Yes. I understand that. All right. Ms. Reynolds?

MS. REYNOLDS: Yes, sir.

THE COURT: What are the other motions you say that require attention now? There's a motion for summary judgment.

MS. REYNOLDS: Yes, sir. There's a motion to dismiss forward progress of the defendant in this case. There is a motion filed by the plaintiffs for summary judgment on the ADEA portion of the counterclaim. There is a defendant's motion for summary judgment basically as to the remaining elements on the counterclaim.

The defendant as well filed a motion for summary judgment as to time-barred claims of four specific plaintiffs. And then there are three uncontested motions that are simply pending. Plaintiffs have a motion to severe [sic] one of the plaintiffs who is still employed, Kermit Lassiter. Plaintiff has a notice of voluntary dismissal of Garland Shifflet which was not opposed. And then there is the parties' joint motion to appoint a Magistrate for purpose of handling discovery issues in the case.

THE COURT: I don't understand the last motion. Isn't Magistrate Judge Snyder assigned to this –

MS. REYNOLDS: Yes, Your Honor.

[7] THE COURT: – action? What other order do I need to make to empower Judge Snyder to resolve discovery disputes?

MS. REYNOLDS: I think that Judge Snyder is empowered to deal with discovery disputes at the present time, Your Honor.

THE COURT: All right. Well, the uncontested motions, of course, will be granted. I'll have to reserve ruling until I can – when did these motions for summary judgment become ripe? When were the briefs all filed?

MR. SCOTT: Your Honor, they're probably more than a year old.

THE COURT: Well, this case has been neglected. And I apologize for that. It's just taken us too long to – when was it that your settlement negotiations broke down? Last summer?

MR. SCOTT: At least – it's been over a year, I know.

THE COURT: All right. Well, what has been the progress of the discovery then in the last year?

MR. SCOTT: Your Honor, there has been mostly requests for production, interrogatories, several sets that have gone back and forth between the parties. We have exchanged a lot of documents. There's a lot that are in dispute. We're going to have to have the Court resolve the issue about getting certain documents.

[8] There's not been any depositions taken. But we do have some beginning the end of June. That is probably the biggest thing that we need to do, is take depositions.

I've discussed with Ms. Reynolds and Mr. Sapp before we came into the hearing that my proposal to the Court would be to set a discovery cutoff at the end of this year. Because that way it will force us – in other words, it puts the burden on us to get this thing done and to get – there's probably going to be far in excess of a hundred depositions that are going to have to be done because of the number of plaintiffs involved, if nothing else.

I think the plaintiffs are looking at probably somewhere around forty depositions. I'm assuming the defendants are going to want to depose each plaintiff that has not been deposed. Now, seventeen have. They've taken seventeen plaintiffs. But the rest they still need to take. So they've got a hundred right there.

THE COURT: Well, let's look forward at the moment to the trial of this case. Nobody is seeking to decertify the class, contrary to my impression.

MS. REYNOLDS: No, Your Honor. Let me lay that out for you a little bit better.

There was a motion filed to certify this class early on. We then agreed amongst ourselves to conditionally certify the class.

[9] THE COURT: I said "decertify."

MS. REYNOLDS: Right. To send out the class a notice, and then we filed a motion to be heard at a later time after the close of discovery, to refile a motion to decertify at that time, which would be a more appropriate time for determining that issue, to rebrief it and to be heard at that time. And I believe that motion was granted.

MR. SCOTT: It has not been filed though.

MS. REYNOLDS: Correct. I mean, to move it or postpone or place in abatement that issue until the close of discovery, at which time the defendants probably will raise the issue of decertification.

THE COURT: Well, all right. We can address that point if we're going to – it seems to me by that time it's going to be moot. Because we're going to have a hundred or 117 plaintiffs who have viable claims against the defendant. Whether it's a Fair Labor Standards Act class or not, it seems to me, has little or no significance at that point. You still have a hundred or 117 claims, whatever it is, that will have to be litigated. And the question is to what extent should they be, if not treated as a class, consolidated for purposes of trial. The issues would essentially be the same.

Where are the common issues in the cases that can be consolidated for trial and where are the individual issues [10] that must somehow or other be resolved seriatim or individually? It seems to me that at that point the class action question is just essentially an academic one. Wouldn't it be?

MS. REYNOLDS: No, Your Honor. If a class is decertified, then the class members who are not named in the complaints are no longer a part of the action. They can then take action on their own to try and initiate another piece of litigation or preserve their rights. But they would no longer be in this case.

THE COURT: Well, I'm not so sure about that under the Labor Act, and especially if we have pursued it

through discovery, Ms. Reynolds. They may or may not have viable individual claims, but they're still plaintiffs before the Court. They would simply be litigating individually, if I decertify the class. But then I would immediately confront the question whether they ought to be consolidated.

MS. REYNOLDS: They may or may not individually litigate. They would have to, of course, apply for leave through the Court, and they would have to find the plaintiffs that they could piggyback onto, whether or not there's an alternative there. And then it's upon them – it's their burden if they want to retain some sort of case or pursue their right to do so.

THE COURT: Well, I agree they would have to [11] affirmatively litigate the case. But assuming that – these 61 plaintiffs at least indicated a desire to do so. It seems to me the question of whether it's a class has essentially been rendered moot. But there's no need to decide it now. It's not before me. I'll worry about that later on.

But the point is, either way we're going to have to confront the question sooner or later as to what extent there are common issues that can be tried jointly, and to what extent there are individual issues that are going to have to be tried individually. And the decisions that we make procedurally, looking toward that kind of ultimate resolution at trial, it seems to me would drive, to a large extent, the decisions that are made on the procedures.

MR. SCOTT: Your Honor, in this case there was another plaintiff by the name of Akin who had a ninety-day letter from the EEOC. And when he received that, we

filed a separate complaint naming all 117 plaintiffs. That case is pending also. *Akin versus Florida Power Corporation*. We also filed a motion to consolidate that case with this case. And I can tell you that the 61 people who opted in have every intention of going forward, whether it's as a joint plaintiff or as part of a class.

And to be honest with you, it doesn't make any difference to the plaintiffs whether it's a class or 117 joined plaintiffs. That doesn't really matter.

[12] THE COURT: Well, I don't think it makes any difference to anybody anymore for the reasons I just stated. I mean, you get to the same situation sooner or later either way in terms of the disposition of these cases. They're either carved up and treated as 117 cases or they're treated as a class or they're consolidated. What difference would it make, Ms. Reynolds?

MS. REYNOLDS: It makes a big difference, Your Honor, in terms of prejudice to the defendant. I mean, if this case is decertified, as most ADEA cases are following discovery on the issues, it does put the 61 plaintiffs to some burden of taking some affirmative action in order to preserve their rights. And plaintiffs –

THE COURT: Beyond what they've already done?

MS. REYNOLDS: Yes, Your Honor.

THE COURT: Such as what?

MS. REYNOLDS: Such as either filing an interlocutory appeal or at some point trying to either move to get into another case or attempting, if they can, to file on their own.

MR. SCOTT: Which they've already done.

MS. REYNOLDS: Right. We have, unfortunately, two pieces of identical litigation in this same Court on different presumably discovery tracks from the *Akin* case.

THE COURT: Well, but the point is they've already [13] filed. Haven't they?

MS. REYNOLDS: Well – and that – they have filed. They have filed in the *Akin* case, and they filed basically an identical action. Seventeen plaintiffs are not in the *Akin* case.

THE COURT: Those are the original plaintiffs in this case.

MS. REYNOLDS: Correct. The remaining plaintiffs have filed in the *Akin* case. Plaintiffs in the *Akin* case who were opt-in plaintiffs, however, had already filed consents to be joined and to be bound in this action in the *Adams* case. So they have, in essence, taken an inconsistent position.

THE COURT: I'm back to where I am, it seems to me. We come to the same result as a practical if not a legal matter, regardless of whether it's a class or individual action. Because I am certainly going – if I'm confronted with 117 lawsuits, having common elements, I'm going to consolidate them to the maximum extent possible in order to try and dispose of all of the common issues at one time, and then treat the individual issues individually. And you get to the same result if it's a class in the same way.

It seems to me you have to take that into account in deciding what is an appropriate discovery track and discovery mechanism in the case.

[14] Is it possible from the plaintiffs' point of view to try the liability issues of all of these plaintiffs in common, Mr. Scott?

MR. SCOTT: Yes, sir, it is. We can do that.

THE COURT: What does the defendant say to that?

MS. REYNOLDS: No, sir. It would – there is no way to try them commonly. They're involved with numerous different decision-makers. In the group of plaintiffs that we have alone, there were at least three different programs or processes that affected them. There was redeployment; there was career transition 1; there was career transition 2. Some of the plaintiffs were terminated for cause. Some of them left voluntarily, even though there was still a job for them.

I mean, there are a whole host of reasons and independent defenses that the defendant would be precluded from bringing up were this tried as a class action, assuming liability is tried together. In addition to the fact of numerosity, which makes it difficult, we think, for a jury to understand the different aspects and different elements that apply to the intent of the decision-maker in an ADEA case.

This is not just damages. This goes to liability and the different programs and processes that affected these individuals and different defenses that would arise as to virtually each and every one of them.

[15] THE COURT: Well, so what do you envision? 117 separate trials?

MS. REYNOLDS: No, Your Honor. That's certainly a possibility, but I think that there probably are some that have some commonality.

THE COURT: Well, how are those to be identified?

MS. REYNOLDS: They'd be identified at the conclusion of discovery.

THE COURT: No. I think – I think we shouldn't have to wait until the end of discovery to do that, especially if there's contemplation of full discovery of all 117 plaintiffs. We can stage this case and begin to try some, discover and try common issues while discovery of individual issues is going on individually. If we're going to try 117 cases, you're going to have to find 117 lawyers, because I'm going to get some judges in here from elsewhere and we're going to start trying them in groups of ten or twelve at a time.

That's why we need to start thinking about the extent to which we can conduct a common trial or trials in this case and let that then drive the decisions that need to be made with respect to the taking of discovery and not the other way around, in my view.

MS. REYNOLDS: I think because the decision-makers were so varied in this case, it would be difficult to have [16] any common trial. It may be possible to break off segments of employees whose fate, as it were, were made by the same decision-maker or decision-making unit and try those, consolidate those plaintiffs.

THE COURT: Well, I have before me an amended case management report that was filed as document No. 165 in this case in the middle of last August. Is that the latest case management report that you have submitted in the case?

MS. REYNOLDS: Yes, sir, it is.

MR. SCOTT: Yes. Your Honor, in that report we could not agree on the dates for cutting off discovery. We could not agree on trial time. I think the plaintiffs wanted a shorter time; the defendants wanted a longer time.

MS. REYNOLDS: I recall it being the other way around. But –

THE COURT: All right. I think the thing to do at the moment, counsel, is the following. I'm going to reserve ruling and now give prompt attention to all of these pending motions and resolve them as quickly as I can, without any further delay.

I think I will direct that you each file within fifteen days, if you cannot agree on a stipulated schedule of discovery from this point, your individual proposals with respect to the staging of discovery from this point on in the case. And I'm talking about all discovery. Merit discovery, [17] including not only liability but damages issues, with respect to all plaintiffs presently before the Court. Your proposals concerning discovery.

And also your proposals, if any, concerning the way in which these plaintiffs might be grouped and what common issues exist that might be tried together, if any, from the standpoint of liability issues as distinguished from damages issues, looking toward an expectation as

you prepare those proposals that the Court is going to be looking to every conceivable device or method available to it to consolidate or coordinate the trials that will be necessary to resolve these cases, especially as to liability, if not with respect to damages.

I will then take those proposals and make an order with respect to discovery, pretrial, and trial, at least tentatively, and perhaps some order with respect to the structure that should be given to this case.

So I suggest that you try and resolve those issues between yourselves or be fully realistic in your proposals. Because if you can't agree, I'm going to make an order. And once I make an order, I'm going to be very difficult to be persuaded that it ought to be modified or altered in some way. And we'll get these cases on track for a trial or trials.

I don't think there'd be any purpose to be served by [18] having argument with respect to any of these other pending motions that you've identified. As I say, I'll just simply take those under submission and get them decided.

Is there anything else you want to raise or discuss for the plaintiffs, Mr. Scott?

MR. SCOTT: Your Honor, I would ask the Court if you would consider in the briefs that have been filed – some of them are well over a year old. If the Court would consider allowing the parties to supplement those if we feel it necessary. A lot may have happened since they were filed. I know there's probably some other issues that have come up.

THE COURT: Well, I'm hesitant to do that, Mr. Scott. All that does is further postpone and delay this matter, and I'm anxious now – and the fault is mine. I'm not faulting counsel. But now that I have confronted my own neglect, I'm prepared to put it right. And I think I'll just take these motions under submission as they are. If there are changed circumstances after you've seen my decision, then you can file additional motions if you want.

MR. SCOTT: Thank you.

THE COURT: Now, what is the representations of these plaintiffs? Do you at least nominally now represent all of these plaintiffs, Mr. Scott?

MR. SCOTT: Your Honor, I represent all plaintiffs except two. There are two that I do not. Mickey Golden and [19] John Gallagher are the two that I do not represent. Mr. Golden is represented by an attorney from Tampa named Howard Shifty, and the other man – Mr. Gallagher represents himself pro se.

THE COURT: And those two plaintiffs, I take it, are opt-in plaintiffs who –

MR. SCOTT: No, sir. They're part of the first seventeen, Your Honor. They're joined plaintiffs. They're in. They've been deposed. There's been some discovery done with those individuals.

THE COURT: All right. Mr. Sapp or Ms. Reynolds, anything else you want to say?

MS. REYNOLDS: I just have one thing to raise, Your Honor, that makes some of these motions a little bit confusing.

For example, the motion to dismiss forward progress filed as to the Second Amended Complaint in this case. We are up to at the present time a Fifth Amended Complaint. And the Court in an order granted the plaintiffs leave to file a Fifth Amended Complaint to add the thirty-nine amendment plaintiffs only as named plaintiffs in this case. That complaint – I am not aware of it having been filed.

THE COURT: I thought we had a Fifth Amended Complaint.

MR. SCOTT: We do, Your Honor. That was filed – the [20] motion to amend was filed at the same time. If the Court wants me to file another one, I can. But it's like 300-and-something pages long.

MS. REYNOLDS: Well, the Court order indicated that there were some inconsistencies that he was getting – your motion was in part denied and in part granted. So there were changes that had to be made subject to a ten-day filing period.

I, frankly, have no objection with him filing one. I just need to know what, what we're playing off of.

MR. SCOTT: I don't – Your Honor, I don't know what else I can do. I mean, it's got all 117. I think the Magistrate entered an order granting the Fifth Amended Complaint which named all 117, and he left the opt-ins as they are, opt-ins.

So I don't know what it is I'm supposed to add or delete.

THE COURT: Well, what do you say to that then, Ms. Reynolds?

MS. REYNOLDS: It indicates in the order, Your Honor, that the complaint needed to be refiled and that certain things needed to be addressed. I think there was an indication in the order that –

THE COURT: Well, I don't understand what "indication" means. What does it say?

[21] MS. REYNOLDS: I'm trying to find it here for you. If you'd give me a minute, please, sir.

THE COURT: This is the Magistrate's order, I take it.

MS. REYNOLDS: Yes. Entered –

THE COURT: What's the docket number?

MS. REYNOLDS: 194, I believe, but I'm not – (Perusing document.) It was entered on the 21st of November of '97.

THE COURT: All right. That will help. And that's on the plaintiffs' motion for leave to file a Fifth Amended Complaint?

MS. REYNOLDS: A Fifth Amended Complaint, Your Honor. The sixty-one opt-in plaintiffs were not permitted as named plaintiffs. The Court order is that plaintiffs' motion is granted and denied in part, and they're granted leave of Court to file an amended complaint within ten days from the date of this order. And I guess this was the first part of November of '97. I didn't know whether I'd not been served with that or if they'd not filed one.

THE COURT: Well, all right. I'll have to examine that and see.

You submitted a proposed amended complaint with your motion for leave to amend, Mr. Scott?

MR. SCOTT: Correct.

[22] THE COURT: Well, I'll have to examine that as I take up these motions and direct such amendments to the pleadings as may be required. But I'm disinclined to order the filing of repetitious papers that have very little effect except to expand the volume and weight of the file.

MS. REYNOLDS: I believe there was some argument or some discussion by the plaintiffs concerning dismissing certain portions, ERISA portions or whatever, as well. And I don't know if that was a part of the order.

MR. SCOTT: No, Your Honor. I don't know anything about that.

THE COURT: All right. I'll take that into consideration.

Is there anything else we can profitably discuss then this afternoon about this case?

MS. REYNOLDS: About the *Adams* case, I don't know. You had also set the *Akin* case down, and there are motions pending in that case as well.

THE COURT: All right. Is there any reason why the two should not be consolidated?

MS. REYNOLDS: Yes, sir, there is.

THE COURT: What is it?

MS. REYNOLDS: Well, for one thing, there's a problem with inconsistent rulings. By permitting the *Akin*

case to be consolidated, you have in effect gone contrary, I guess, to [23] the Court's order of the 21st that we just talked about, which precludes the 61 opt-in plaintiffs from being added to this case as named plaintiffs. So that ab initio, we have inconsistent rulings that affect the *Adams* case.

THE COURT: Well, I'm not sure that I understand that, Ms. Reynolds. It may –

MS. REYNOLDS: It goes to the decertification issue as well, Your Honor, whereas – if the plaintiffs are not named at the time the case is decertified, they go to the four winds.

THE COURT: They do what?

MS. REYNOLDS: They have to take some action in order to get back into a pending lawsuit if there is one that they can piggy-back on to.

THE COURT: Well, but they've already done that, in effect, by filing the other action. So it brings us right back where we were.

MS. REYNOLDS: So we in effect have inconsistent rulings by consolidating cases.

THE COURT: Well, I don't see how it's inconsistent. The Magistrate Judge simply said they couldn't come into this case.

MS. REYNOLDS: As named plaintiffs.

THE COURT: So they file their own case. Right?

MS. REYNOLDS: As named plaintiffs, Your Honor. [24] Although, at the time the *Akin* case was filed,

that motion was pending, the motion to file the Fifth Amended Complaint.

THE COURT: Well, is there a motion to dismiss –

MS. REYNOLDS: Yes, Your Honor, there is.

THE COURT: – the other case?

MS. REYNOLDS: Yes, Your Honor, there is.

THE COURT: And the grounds are what?

MS. REYNOLDS: The grounds are that the first-to-file rule should apply. But, in essence, they filed a case that is virtually identical to the *Adams* case, and it involved the same claims, state claims, age claims, under both federal and state law. While there is no explicit ERISA claim, the allegations in *Akin* directly align with the allegations in the *Adams* case, that they were targeting old, infirm employees in order to reduce the medical costs.

And under Rule 12, the Court says, "Commonly held or founded cases can be dismissed where issues presented could be resolved in an earlier-filed action." And that is exactly what you have here. You have an earlier-filed action, that action being the *Adams* case.

Under that rule, irrespective of consolidation, if you – you can dismiss a case in order to preserve and conserve judicial resources and to preclude what would happen if that case were consolidated, which is inconsistent rulings.

[25] The reason that case was filed by the plaintiffs, at least it was espoused in their response to this motion,

was in order to prevent the running of the statute of limitations as to Akin and I believe Hayes, another plaintiff. That act was unnecessary, because all of the plaintiffs named in that case, all of whom are in the *Adams* case, either by virtue of the Third or Fourth or Fifth Amended Complaint, or because they have simply opted into the case – all of them have affirmatively acted to come into the *Adams* case. Because they have done that, the Courts both in *Grayson, Durant, Armstrong,* pretty consistently hold that they have not, that the statute of limitations has tolled as to them.

So there was no need to file the *Akin* case. It was simply a superfluous case to the case in *Adams.*

THE COURT: Well, except you reserve the right to argue for decertification of the class.

MS. REYNOLDS: I'm sorry?

THE COURT: You reserve the right to argue that there should be a decertification of the class. Isn't that an inconsistent position?

MS. REYNOLDS: Not –

THE COURT: To say that they can't file their own lawsuit but they can't be certified as a class?

MS. REYNOLDS: It goes to the issue of the distinction between, Your Honor, a named plaintiff and an [26] opt-in plaintiff. I think that there are different issues in decertification. It goes to whether or not they're similarly situated. And the fact that there's an *Akin* case – it's as if the plaintiff is getting two bites of the same apple. There's been an issue and a ruling made as to the status of the non-original plaintiffs. That is, that 61 of

those plaintiffs are opt-ins, do not become named parties in the action. So that those are the individuals who would be affected by the decertification, Your Honor.

There is a distinction between a named plaintiff and an opt-in plaintiff. A named plaintiff, for example – or at least I believe it's the *Grayson* case that indicates that you have to rely on the charge of a named plaintiff. You don't want to piggyback in –

THE COURT: Well, all right. But wouldn't – it seems to me, Ms. Reynolds, if, in fact, those opt-in plaintiffs, having been determined to have opt-in status only insofar as the *Adams* case is concerned, are still subject to the possibility that the class will be decertified.

That, in and of itself, would afford a good-faith basis, if they wish to do so, to file a separate action as named plaintiffs before the statute of limitations runs. Would it not?

MS. REYNOLDS: I disagree, Your Honor. In opting in to this case, they agreed to be bound by the decisions in the [27] *Adams* case. I think that they're in essence doing exactly contrary to what they've agreed to do, which is to become a party or an opt-in plaintiff in this case, after we have agreed to provide them with notice. These individuals wouldn't be named plaintiffs anywhere but for the fact that we agreed to facilitate and provide notice to individuals out in the general public.

By having them come in and that automatically making them named plaintiffs and giving them rights beyond their opt-in notice rights is almost as if we –

THE COURT: Well, I don't think it has that right. But it certainly can't foreclose their right to institute an independent action when their class status is still inchoate.

MS. REYNOLDS: I believe that it does, Your Honor. I believe that they're bound in the *Adams* case to the rulings in the *Adams* case until such time as those rulings kick them out of the *Adams* case.

THE COURT: And then what can they do?

MS. REYNOLDS: And then they can do whatever it says they can do under the *Armstrong* case, I believe it is. They can either append to a charge that they would be able to piggyback on to. They can attempt to, if they file a charge, to file an individual action. They can appeal.

But they are different in their status from named plaintiffs by virtue of the, in large part, by virtue of the [28] notice that goes out. I don't think any defendant would be anxious to agree to a notice that would then effectively be advertising class status as named parties for individuals in the general public.

THE COURT: I understand the point, and I will look at it. It may be that I don't fully grasp the considerations involved. But I find nothing in that argument that persuades me as I sit here. But neither do I decide it. I'll try to resolve all this at one time and get this case back on track, both of them, in fact.

Is there anything else?

MR. SCOTT: Nothing, Your Honor.

MR. CHARLTON: Nothing, Your Honor.

MS. REYNOLDS: No, sir, Your Honor.

THE COURT: All right. Thank you, counsel.

MR. CHARLTON: Thank you, Your Honor.

(And thus the proceeding concluded at 5:17 p.m.)

[29] **CERTIFICATE**

STATE OF FLORIDA)
)
COUNTY OF DUVAL)

I hereby certify that to the best of my knowledge and belief the foregoing transcript is a true and correct transcription of my stenographic notes and electronic tape recording made at the time and place specified herein.

WITNESS my signature and official seal at Jacksonville, Duval County, Florida, this 28th day of August A.D., 1998.

/s/ Mildred W. Shealy
MILDRED W. SHEALY, R.P.R.,
Official Court Reporter

EXHIBIT K

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM FILE:

TO: Joe Richardson DATE: October 25, 1993

Per our conversation today on the Redeployable Program, I have learned that decisions are being made and communications planned for the employees impacted prior to review by my department. This is not in accordance with the agreement we made when the program was approved. Any department desiring to place individuals into the Redeployable program should contact me in order to review the candidates and ensure none are poor performers. Once I have given approval and senior management concurs, we schedule the employees to be informed by the immediate supervisor and orientation with myself or Dean Montgomery. In some instances, this is not occurring.

Please remind the senior management team of the above in order to continue to have a well managed and positive program. If there are any issues or concerns, please call me.

/s/ Edna
Edna C. Jones

xc: G.M/ Rickus, Jr.
H. D. Montgomery

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM FILE

TO: Joe Richardson DATE: November 3, 1993

Attached you will find the report for the month of September, 1993 on the Redeployables and poor performers. This report will be submitted to you by the 10th working day of the month. If you have any questions, please call me.

/s/ Edna
Edna C. Jones

xc: George M. Rickus, Jr.

[Joe – Does this meet your needs

/s/ [Illegible]

check total FPC #]

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Work Force Diversity	D2A	231-5493
Office	MAC	Telephone

PERSONAL & CONFIDENTIAL

SUBJECT: Redeployment Process Recommendations

TO: George Rickus DATE: March 31, 1993

Attached is the Redeployment Process Presentation and recommendations as to how a third-party provided (outplacement firm) will support our efforts. As noted in the presentation, the majority of redeployable employees will participate in our in-house career transition workshops.

We recommend, as identified on pages 4 and 5, only senior management redeployable employees will be referred to an outplacement firm. Those firms providing initial responses to our requests fully understand these employees will be searching for job leads internally and externally simultaneously. Further, they will provide specific status reports on each client referred.

The internal process is well defined and to ensure the absolute partnership expectations with the third-party the following elements need to be clarified. It is recommended that Drake Beam Morin, Inc. and Right Associates have an opportunity to respond to the following questions. They both presented focused proposals and competitive pricing schedules.

1. Redeployable employees at a market value of $82,000 and above will be referred to a third-party. What pricing schedule will be offered for these referrals?

2. Redeployable employees referred directly to a third-party provider will continue to job search internally with Florida Power; and subsequently, may secure an internal position rather quickly. Accordingly, what kind of rebate will be guaranteed to Florida Power should a limited amount of counseling service be provided?

3. Relative to a contingency plan, we need assurance that the provider can respond within a two-day period to conduct workshops to handle any overload situations. Can they confirm this request?

4. What services (and fee arrangement) can be provided to develop external job leads locally and nationally to support those employees participating in Florida Power's inhouse sessions?

If this meets with your approval, I'll send the questions immediately to both vendors. Additionally, it might make sense to provide them a copy of our defined process for clarification and reactions.

/s/ Dean Montgomery
H. Dean Montgomery

REDEPLOYMENT PROCESS

PRESENTED BY
WORK FORCE DIVERSITY

MARCH 1993

MISSION STATEMENT

PROVIDE PLACEMENT COUNSELING TO REDEPLOYABLE EMPLOYEES TO ENHANCE THEIR MARKETABILITY IN SECURING A NEW POSITION WITHIN FLORIDA POWER CORPORATION OR EXTERNALLY WITH ANOTHER FIRM.

SUMMARY

This overview will address what career and job search counseling will be made available to redeployable employees. The emphasis is on placement and managing a positive outcome through the counseling process.

To support redeployable employees, Florida Power Corporation will offer career transition counseling for a period of up to one year.

At the senior manager level, career transition counseling will be offered by a third party provider. All other professional redeployable employees will receive career transition counseling through in-house job search workshops with individual follow up counseling.

Also designed into this process is a contingency plan whereby a third party provider will be available to conduct workshops for any overload situations.

REDEPLOYABLE RESOURCES – FINAL

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:
  - Position reduction due to business process improvement.
  - Position reduction at holding company.
  - Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to quality for internal positions.
- Redeployable employees remain at current salary for up to one year or until one of the following occurs:
  - Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.
  - Job offer refused, employee released without remaining salary paid.
  - If voluntary termination, remainder of one year's salary paid.
  - As a result of *placement process* individual accepts *or* rejects external job offer.
  - Separation at one year after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:
  - A redeployable individual has to initiate application for job opening.
  - Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified to the present supervisor and supervisor's responsible Senior V.P.
  - if disagreement, goes to President for final review and decision.
- Redeployable employees remain in their department and in the department budget until "one year" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.
- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.
- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.
  - Evaluate who is being declared redeployable.
  - Who gets job offers.
  - Who actually is released from Company.
- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

[REDEPLOYMENT PROCESS
Flow Chart Omitted In Printing]

REDEPLOYABLE EMPLOYEE STATUS DEFINITION

As employees are identified for the redeployment counseling process, they will be informed as to their referral status, and at that time, all process particulars will be explained to them by the appropriate Human Resources representative. (Edna Jones or Dean Montgomery will have primary responsibility to precisely inform the employee of all program elements and have the Redeployable Process form acknowledged and signed). Additionally, it is recommended that the employee's Supervisor be present at this meeting to generate complete understanding on everybody's part as to the established priority in securing another position (internally/externally) during the 12 month time frame.

Redeployable Employee will be identified as follows for referral purposes:

LEVEL	REFERRAL CRITERIA
(1) Management Employee	All employees with manager titles will be referred to the selected outplacement firm.
(2) Supervisory/ Exempt	These employees will participate in the in-house job counseling program.

(3) Professional — All other exempt and non-exempt employees. These employees will participate in the in-house counseling program.

any redeployable employee referred immediately to the outplacement firm will receive the same reference materials as in-house clients. Further, they will receive one-on-one counseling as it relates to key internal search techniques as well as performance feedback from all appropriate sources.

REDEPLOYMENT PROCESS PROCEDURES

- Employee is notified by his/her Supervisor that he/she is being referred to the Redeployment Process.

ACTIONS

- Supervisor alerts Edna Jones or Dean Montgomery to schedule meeting with redeployable employee (Edna Jones/Dean Montgomery will be responsible for ensuring a smooth transition and total acknowledgement of the process elements).
- Initial meeting conducted with redeployable employee (employee's Supervisor present) to describe the process and have employee sign the appropriate form.
- Counseling materials provided to participant and scheduling referral dates established for orientation and either in-house and/or external counseling session. (It is imperative these dates occur immediately)
- Human Resources Office process counselor alerted of employees within their service area

General Office Complex	– Edna Jones/Dean Montgomery

Suncoast Division	– Edna Jones/Dean Montgomery
Central/Northern Division	– Maggie Pointer
Eastern/Ridge/ Mid-Florida Division	– Dan Hosford

- Management Redeployable employee referred to outplacement firm.
- Human Resources manages a weekly strategy meeting to capture participant's progress or proper feedback to Senior Management regarding lack of progress. Outplacement firm provides the same information.
- Central file maintained at General Office Complex for case management reviews.

[REDEPLOYABLE EMPLOYEE CASE MANAGEMENT PERFORMANCE CHART Omitted In Printing]

EVENTS

(A)
- Initial meeting held (form signed)
- Introductory materials provided (work book, reference books)
- In-house 2-day workshop starts – ends

(B)
- New resume produced
- application via "Special" Opportunity bulletin starts

(C)
- Interviewing skills assessed
- Networking strategies developed

(D)
- Resume on street (internal/external)
- Internal Interviews conducted/evaluated
- Weekly planning/results sessions

(E)
- External interviews occurring
- Strong performance evaluation against process to predict success
- Documented weekly case reviews/coordinated with master file

(F)
- On-going case progress reviews and consultation

NOTE

This time-line chart depicts the critical milestone dates to measure performance and chart progress. In those situations where the redeployable employee appears to be falling behind, Human Resources will initiate action to alert both the employee and his/her supervisor.

IN-HOUSE REDEPLOYMENT
JOB SEARCH COUNSELING

- PROVIDED SERVICES
  - Job Search Counseling/Reference Center
  - Phone/Fax Support
  - Administrative Support
  - Reference Materials
- JOB SEARCH WORKSHOP (2-Day)
  - Career Development Session
  - Job Search Session
  - Individual Follow-up Session

IN-HOUSE REDEPLOYMENT
JOB SEARCH COUNSELING
(CONTINUED)

- KEY ELEMENTS OF JOB SEARCH SESSION
  - Orientation . . . "Enabling techniques"
  - Job Search Do's & Don'ts . . . "Quality performance starts with the fundamentals"
  - Career Development/Analysis
  - Resume Preparation . . . "Calling Card"
  - Interview Training . . . "A Re-look"
  - Marketing/Network Strategies
  - Recordkeeping
  - Individual Performance Measurement
  - Opportunity Bank of Job Leads

ASSISTANCE OFFERED TO IDENTIFY EXTERNAL
JOB OPPORTUNITIES

- Newspaper Search (local/national)
  - National Employment Weekly
- Periodicals
- Networking
  - Community Organizations
  - Utility Companies
  - Job Search Directories
- Job Service Office (disclaimers)
- Temporary Employment Agencies

- Search Firms (local/national)
- Resume input to computerized data bases

ACTION:

- Publish resume books to local/national companies
- "Networking" Introductions
- Job Development Center (identifying jobs locally and nationally)
  - Contract with third-party provider to support this element of the process.

VACANCY COMMUNICATION TO REDEPLOYABLE EMPLOYEES

- OBJECTIVE
  - Redeployable employees *will have first consideration* at all job vacancies as they develop
- METHODS
  - A weekly Opportunity Bulletin will be exclusively published for all redeployable employees to declare interest
  - The position will be held for 10 working days prior to being published on the regular Opportunity Bulletin (unless notified differently by management)
  - Supervisor will be responsible to stay alert to possible placements for their employees by working through the supervisor with vacancy.

    NOTE: Senior Management should know all the redeployable employees and appropriate employment consideration offered even outside the Opportunity Bulletin process.

REDEPLOYABLE CONTINGENCY PLAN

•SHOULD AN UNEXPECTED NUMBER OF PROFESSIONAL ASSOCIATES BE IDENTIFIED TO PARTICIPATE IN THE REDEPLOYABLE PROCESS, THE FOLLOWING HAS BEEN ARRANGED WITH AN OUTPLACEMENT FIRM TO ASSIST AND SUPPORT OUR NEEDS:

–Services provided immediately

–Conducted off-site

–Support our initiatives – both internal and external job search

–Monitor progress

PROCESS PERFORMANCE MEASUREMENT

•All redeployable employees are placed either internally or externally within the one year time frame.

•All redeployable employees feel that their search efforts were enabled through the placement counseling and the experience was positive for all concerned.

REDEPLOYMENT PROCESS FORM

- CONFIDENTIAL -

To: Edna C. Jones (D2A) From: _____

Employee: _____ Phone: ( )_-_____

Position Title: _____ Social Security Number: _____-_____-_____

Work Location: _____ Phone: ( )_-_____
Hire Date: _____ Salary: _____
(Monthly)

Redeployment Process Starts: _____

Redeployment Process Ends: _____

_____

The Redeployment Process has been explained to me and I fully understand my responsibilities in locating and securing another position within Florida Power Corporation or externally with another firm. I further understand there is a one year limit placed on this process.

_____/_____
Employee Signature Date

_____/_____
Human Resources Date
Representative

[LOGO] Florida
Power
CORPORATION
INTEROFFICE CORRESPONDENCE,

Human Resources	**A7A**	**231-4298**
OFFICE	**MAC**	**TELEPHONE**

SUBJECT: **Workforce Reductions**

TO: **Dr. J. B. Critchfield** DATE: April 3, 1995

FROM: P. K. Blizzard
/s/ PK Blizzard

You have requested an analysis of reductions in the workforce since July, 1993, when Florida Power Corporation started the first downsizing program. In addition to the three downsizing programs (Redeployment, Early Retirement, and Career Transition), you also have requested information on attrition and terminations. That information is attached. It is configured two ways: by type of employee and by program.

Please contact me if you have any questions.

PKB:mf

Attachment

WORKFORCE REDUCTIONS
7/1/93-3/17/95

REDUCTIONS: BY CATEGORY

	Number	Percentage
Management	196	18%
Exempt Employees (non-management)	355	33%
Non-Exempt Employees	347	32%
Bargaining Unit Employees	181	17%
Total Reductions Since 7/1/93	1,079	

REDUCTIONS: BY PROGRAM

Non-Union:	Number	Percentage
Redeployment Process (7/1/93-6/1/94)[1]		
Exempt Employees	116	46%
Non-Exempt Employees	111	44%
Building Management (hourly)	25	10%
Total	252	
Early Retirement (2/94)[1]		
Exempt Employees	148	83%
Non-Exempt Employees	30	17%
Total	178	
Career Transition (6/2/94-3/17/95)[1]		
Exempt Employees	156	70%
Non-Exempt Employees	68	30%
Total	224	

[1] Not available to union employees.

Attrition and Termination[2]	244
Total Reductions: Non-Union Employees	898
Bargaining Unit:	
Layoffs	58
Attrition	95
Termination	28
Total Bargaining Unit Employees	181
Total Employees	1,079

WORKFORCE REDUCTIONS
7/1/93-[2/28/95]

REDUCTIONS: BY CATEGORY

	Number	Percentage
Management	196	18%
Exempt Employees (non-management)	355	33%
Non-Exempt Employees	347	32%
Bargaining Unit Employees	181	17%
Total Reductions Since 7/1/93	1,079	

[2] Attrition includes death, termination, disabilities, and retirement.

REDUCTIONS: BY PROGRAM

Non-Union:	Number	Percentage
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Exempt Employees	116	46%
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Building Management (hourly)	25	10%
Total	252	
Early Retirement (2/94)[1]		
Exempt Employees	148	83%
Non-Exempt Employees	30	17%
Total	178	
Career Transition (6/2/94~~-3/17/95~~ [2/28/96])[1]		
Exempt Employees	~~156~~ [268]	~~70%~~ [71%]
Non-Exempt Employees	~~68~~ [107]	~~30%~~ [29%]
Total	~~224~~ [375]	
Attrition and Termination[2]	244	
Total Reductions: Non-Union Employees	898	
Bargaining Unit:		
Layoffs	58	
Attrition	95	
Termination	28	
Total Bargaining Unit Employees	181	
Total Employees	1,079	

[1] Not available to union employees.

[2] Attrition includes death, termination, disabilities, and retirement.

EXHIBIT L

SUPERVISOR'S SUMMARY GUIDELINES FOR DOWNSIZING

The explanations provided below define the **categories** for downsizing, the **criteria** for each of these categories, benefits provided to each category of employees, and other related pieces of information to be used by supervisors in implementing this program.

These "Guidelines" are applicable to exempt and non-exempt employees. Bargaining unit employees **are not included**. The "Memorandum of Agreement" provisions will be applied to bargaining unit employees.

POOR PERFORMERS

Definition: The employee is not meeting present expectations of the job.

Documentation: There should be past performance review(s) indicating performance issues as well as past performance memos outlining expectations of the supervisor and a timetable to reach an acceptable level of performance. This level of performance was not met during the required time frame.

These employees are eligible for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.

4. May be eligible for unemployment compensation. Employees should refer to the Governmental Section of their telephone directory to determine the location and telephone number of their local Unemployment Compensation Claims Office. The employee will be provided with a brochure from the Division of Unemployment Compensation.
5. Continuation of medical and/or dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining options for continuing medical and/or dental coverage. The employee has a deadline to respond. The employee pays the full premium (the Company and employee portion) plus a 2% administrative fee.
6. The Employee Assistance Program (HELP) will be made available for six months after termination.
7. Employees with a Savings Plan account balance will receive and complete an election form to direct how they wish to receive the final distribution of their Savings Plan account. Employees with an account balance of at least $3,500 may decide **when they wish to receive** their final distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their determination.

These employees are <u>not eligible</u> for the following:

1. Career Transition compensation.
2. Payment for unused personal floating holidays.
3. Career Transition Workshops.
4. Two hours of financial counseling.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

EMPLOYEES WITH AVERAGE OR BETTER PERFORMANCE BUT THE JOB IS ABOLISHED

Definition: **The employee is meeting or exceeding the expectations of the position, but the position needs to be abolished.**

Documentation: Past evaluations should reflect average or better performance.

These employees are <u>eligible</u> for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.
4. **Career Transition compensation** is calculated as **one week of pay for each six months of service**. Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

5. May be eligible for unemployment compensation. Employees should refer to the Governmental Section of their telephone directory to determine the location and telephone number of their local Unemployment Compensation Claims Office. The employee will be provided with a brochure from the Division of Unemployment Compensation.

6. Career Transition Workshops will be made available by Human Resources. These two-day workshops will cover resume writing, networking, interviewing, and will provide a transition for the employee from the company to the workplace. The employee will be responsible for contacting the appropriate Human Resources Regional Office for scheduling, if they wish to attend.

7. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

8. Employees may be considered for re-employment when Florida Power positions are recruited externally after the period of time has expired for which they were compensated.

9. Continuation of medical and/or dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining options for continuing medical

and/or dental coverage. the employee has a deadline to respond. The employee pays the full premium (the Company and employee portion) plus a 2% administrative fee.

10. The Employee Assistance Program (HELP) will be made available for six months after termination.

11. Employees with a Savings Plan account balance will receive and complete an election form to direct how they wish to receive the final distribution of their Savings Plan account. Employees with an account balance of at least $3,500 may decide **when they wish to receive** their final distribution. They may elect to leave their funds within the Plan until the months following their 65th birthday, or they may elect to receive a final distribution in any month after their termination.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

<u>EMPLOYEE WITH "AVERAGE" EVALUATIONS; HOWEVER, AN EXCELLENT EMPLOYEE'S JOB IS BEING ELIMINATED AND YOU WANT TO REPLACE THE AVERAGE EMPLOYEE WITH THE EXCELLENT EMPLOYEE</u>

Documentation:

1. Do an objective evaluation of the employees within the department.

2. Determine the positions to be filled and the competencies required. Select the employees to fill the positions based on your evaluation performed in #1. If you have vacancies, communicate with other managers who may be displacing excellent employees who could fill your vacancies.

3. If the employee is not placed and the position is not abolished, the compensation, guidelines, and general information are the same as in the example above for **EMPLOYEES WITH AVERAGE OR BETTER PERFORMANCE, BUT THE JOB IS ABOLISHED** category.

CAREER TRANSITION FOR EMPLOYEE WHO IS ELIGIBLE FOR RETIREMENT

Definition: To meet minimum early retirement eligibility requirements, the employee must be at least 55 years old and have at least 15 years of Continuous Service, as defined in the plan document for the Employees' Retirement Plan of Florida Progress Corporation (Retirement Plan). To meet this age requirement, employees must be actively employed through the end of the month they reach age 55.

These employees are eligible for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring prior to their termination date.
4. Post-retirement medical coverage for the employee and their spouse and life insurance coverage.

Employees will be provided details about the program and related costs during their retirement counseling.

5. Continuation of dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining the options for continuing dental coverage. The employee has a deadline to respond. The employee pays the full contribution amount plus a 2% administrative fee.

6. A monthly pension benefit payable from the Retirement Plan based upon the payment option elected by the employee.

7. **Career Transition compensation** is calculated as **one week of pay for each six months of service**. Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

8. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

9. The Employee Assistance Program (HELP) is available to the employee as long as they elect retiree medical.

10. Employees' retirement counseling will cover all aspects regarding the timing and payment options for receiving their final Savings Plan distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their retirement.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

CAREER TRANSITION FOR EMPLOYEE WHO IS ALMOST ELIGIBLE FOR RETIREMENT

Definition: If the employee would reach retirement eligibility within the number of weeks derived in the calculation for Career Transition compensation, you may maintain the employee on the payroll as an active employee for the required time until retirement.

If it does not take all the weeks derived in the Career Transition compensation calculation to reach retirement eligibility, the excess weeks will be paid to the employee in a lump sum when they retire. The employee's supervisor and senior officer will determine if the employee remains at

work or is to remain at home, available for consultation if needed.

If the employee would not reach retirement eligibility within the number of weeks used in the Career Transition compensation calculation, the employee should be released using one of the options above. **If this is the case, eligibility for programs follows the category under which the employee is released, not what is shown below.**

These employees are <u>eligible</u> for the following:

1. Payment for wages earned but unpaid.
2. Payment for unused vacation.
3. Payment for unused regular holidays occurring **prior to** their termination date.
4. Post-retirement medical coverage for the employee and their spouse and life insurance coverage. Employees will be provided details about the program and related costs during their retirement counseling.
5. Continuation of dental coverage under COBRA. Human Resources will contact CobraServ, who is the Plan Administrator, and CobraServ will send the terminated employee a letter explaining the options for continuing dental coverage. The employee has a deadline to respond. The employee pays the full contribution amount plus a 2% administrative fee.
6. A monthly pension benefit payable from the Retirement Plan based upon the payment option elected by the employee.
7. **Career Transition compensation** is calculated as **one week of pay for each six months of service.**

Adjusted Service Date, which is the date used to determine vacation, will be used for this calculation. Service over a six month increment should be rounded up to the nearest six months using the adjusted service date. Examples of calculations are as follows:

Service	Calculation
20 years	20 years x 2=40 weeks
20 years, 5 months	20 years x 2=40 + 5 months=41 weeks
20 years, 7 months	20 years x 2=40 + 7 months=42 weeks

8. Two hours of financial counseling will be made available. An outside contract is in place. The employee will be responsible for contacting the financial counselor directly for scheduling, if they wish to attend.

9. The Employee Assistance Program (HELP) is available to the employee as long as they elect retiree medical coverage.

10. Employees' retirement counseling will cover all aspects regarding the timing and payment options for receiving their final Savings Plan distribution. They may elect to leave their funds in the Plan until the month following their 65th birthday, or they may elect to receive a final distribution in any month after their retirement.

These employees are <u>not eligible</u> for the following:

1. Payment for unused personal floating holidays.

General Information

1. Supervisors should refer to **Attachment 1** for a checklist of things to do and items to collect from employees leaving the Company as well as for a Listing of Contact People.

SUPERVISOR'S SUMMARY
GUIDELINES FOR DOWNSIZING

ATTACHMENT 1

1. **A. The supervisor should obtain the following items from all employees leaving the Company:**

   - identification badge.
   - credit cards.
   - keys.
   - company equipment.
   - company manuals (**except for the "You and Your Company: A Strategic Partnership manual, which the employee should keep**), and
   - any working fund advances.

   B. The supervisor should verify the employee's home address and home phone number and update the profile with the corrected information.

   C. The supervisor should cancel the employee's computer access by contacting Data Security at 231-4301.

D. The supervisor should notify Payroll of the termination at 231-5376 and process the termination through the profile immediately. If a position is to be abolished, a Position Control Request form must be completed and accompany the profile (see attached example). **If the employee is eligible for career transition compensation, please provide a completed copy of Attachment 2 to both the Payroll and Workforce Management Departments.**

E. Security should be notified if the situation warrants (ie. the employee threatens supervisor or other employees).

2. Listing of Contact People

All questions regarding the following benefit plans:

Retirement Plan
Cheryl Surbaugh 231-4257 or (813) 866-4257
Savings Plan
Mary Nevitt 231-4258 or (813) 866-4258

For scheduling or questions related to Career Transition Workshops and/or Financial Counseling:

Central Florida Region:
Darryl Rollins 222-4381 or (407) 646-8381
Dan Hosford 222-4387 or (407) 646-8387

North Florida Region:
Gail Tiffany 240-6232 or (904) 795-6725 Ext. 6232 (813) 866-5802

Suncoast Florida Region:
Mitchell Carter 220-5604 or (813) 562-5604

ATTACHMENT 2

CAREER TRANSITION NOTIFICATION

To: Phil Yee, Payroll Department Date:

Please be notified that the following employee is being terminated from the Company under one of the categories of employees which qualifies for Career Transition compensation.

Employee Name: _____

Employee Social Security Number: _____

Eligible for Early Retirement: Yes No

Termination Date: _____

Supervisor's Name: _____

Supervisor's Title: _____

_____
Supervisor's Signature

cc: Edna Jones, Workforce Management

[EXHIBIT M – 1994 & 1995 Career Transition By VP Chart Omitted In Printing]

[EXHIBIT N – 1995 Employee List Sorted By Date, Florida Power Corp. 12/21/95 Chart Omitted In Printing]

[EXHIBIT O – 1994 CT By Term Date Chart Omitted In Printing]

EXHIBIT P

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Employee Numbers

TO: Edna Jones DATE: November 16, 1994

FROM: P. K. Blizzard

By 4 p.m. today, I need the following information:

For the three downsizing programs – redeployment, early retirement, career transition – how many exempt, non-exempt and bargaining unit employees left the company? This needs to be broken down into the three categories for each of the three programs. Also, what were the approximate dates of the three programs? This information is requested by Dr. Critchfield for the Board of Directors meeting tomorrow morning; therefore, I need to have it before 4 pm today. Here is what I have from various correspondence, but I need to have it verified and completed:

Redeployment: Oct. 93 to May 94 – 230 employees (no break out). 117 bargaining unit employees laid off but 64 were rehired as casual or temporary employees.

Early retirement: Feb. 94 – 178 regular employees (151 exempt, 27 non-exempt). No bargaining unit.

Career Transition: Oct. 94 and continuing through 1995 – 181 regular employees to date (132 exempt, 49 non-exempt). I have been told that 70 bargaining unit employees will go out, but have not verified this nor do I

know if it has happened. An additional 50 positions will go after Jan. 1.

[Handwritten Note]

Redeployment Process:	July 1, 1993 – June 1, 1994
Exempt	116
Non-Exempt	111
Hourly (Bldg Mgmt)	25
TOTAL:	252

Early Retirements:	February 1, 1994
Exempts	148
Non-Exempts	30
TOTAL:	178

Career Transition Process:	June 2, 1994 →
Exempts	132
Non-Exempts	49
TOTAL:	181

T50 people unknown

TOTAL: 611

Bargaining Unit 119 = 730

To: BTOWER:AMCGINTY PY
From: PBLIZZAR
Subject: Re: Touch Base on WF Reductio
Date: 10-17-94 Time: 7:35p

Originated by :AMCGINTY 10-14-94 11:23a
Replied by :PBLIZZAR 10-17-94 7:11p

I have finally received a revised list from Energy Supply. They did a good job in laying out the position reductions per department. First, their area 19 non-union employees terminated (3 are going to be paid past 10-94 because they are bridging until retirement) – Steam Plants (G. Marks): 4; Comb. Turbines (Stitt): 0; Fuels (Davis): 2 (but replaced with 1 new employee, therefore, net 1); Design and Construction (Major): 4; Energy Supply Service (Baldwin): 9 but replacing 1 so net 8; Business Development: 0.

24 bargaining unit positions (cannot be identified by RA until rolling is finished because they can roll across RAs)

In addition, in Energy Supply, there are 8 people in R.C. Bonner's group being transferred to Progress; 3 are being sent back to the Bargaining Unit; vacant positions are being abolished (4 were originally in 1995 budget but are now out); 1 non-union was transferred to CR3; 1 to Technical Services; and [illegible] to HR. Total: 62 positions gone with 61 originally in budget for 1995 but already taken out with the $10.5m decrease.

Energy Distribution: (I think you only need bargaining unit from now on, because the rest are on the sheets I gave you): Central Florida: 15, Suncoast: ?; Northern Fla: 30. You may want to call Janice Case to get the number of bargaining unit employees. I never got that number.

Energy Delivery: 2 b.u. (System Protection & Control Technicians). That's it by my numbers, but I cannot guarantee that they are correct until they do the Bargaining Unit layoffs. I'll try to get you an updated list as soon as it is ready. Call if I can help in any way.

EXHIBIT Q

To: PBLIZZAR
From: PWATERS
Subject: Career Transition Process
Date: 10-26-94 Time: 10:14a

Pat:

Here goes:

1. All employees on the list are in Company 01 – Florida Power Corporation.

2. We're sending you an Alpha listing and a listing by VP.

3. Males = 125, Females = 84

4. EEO Code #1 = White = 178
   EEO Code #2 = Black = 21
   EEO Code #3 = Hispanic = 7
   EEO Code #4 = Asian/Pacific Island = 3
   EEO Code #5 = Amer Ind/Alaskan Nat = 0
   EEO Code #99 = Unknown = 0

5. Exempt = 143
   Non-exempt = 66

6. Age 40 and over = 149 both together equal the 209 as of 10/25/04 ([illegible] 95 listings)
   Age 39 and under = 60

7. Retirees are identified by Retirement Date Colum .28 retirees

8. Dept. Numbers that are 3 digit have a zero at the beginning and this is not showing up on the list.

9. VP Code #0 = Keesler = 0
   VP Code #1 = Richardson = 0

VP Code #2 = Heinicka = 18
VP Code #3 = Beard = 18
VP Code #4 = Phillips = 112
VP Code #5 = Richardson = 17
VP Code #6 = Hancock = 19
VP Code #7 = Miller = 16
VP Code #8 = Henry = 8
VP Code #9 = Conner = 1

10. On verification of check amounts . . . .We verify against the original dataset that the comp amount for each individual is correct. We provide a copy of that verified dataset to Phil Yee, daily, which shows the date of the signed agreement forms. He then cuts a check for that comp amount, less taxes, and any other amounts owed to the company, if applicable.

11. Please keep in mind that HR has been removed from the list. With the exception of one person.

I think this covers it so far, let us know if you need further information.

Thanks.

Penny
Paige
Karen

[LOGO] Florida Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Trust Planning	D2S	231-4028
OFFICE	MAC	TELEPHONE

SUBJECT: ANALYSIS OF RESTRUCTURING IMPACTS

DATE: June 30, 1994

TO: P. M. Beard, Jr.
J. R. Heinicka
D. L. Miller
J. H. Richardson
J. A. Hancock
P. C. Henry
M. H. Phillips

In an effort to assist Mr. Korpan in his upcoming meetings with analysts, the enclosed worksheets were prepared to analyze:

1. **The Impact of Workforce Reductions and Related Pretax Cost Savings** for employees who have left the company through attrition or other reasons for the time period from January 1993 to December 1996, whose positions have been abolished.

2. **The Impact of Additional Costs or (Savings) for Major Items.**

Copies of these schedules are attached for your information. We appreciate the assistance Human Resources received from each of your organizations to identify employees affected by these programs and the associated cost savings.

If you do have any questions, please give me (866-4028) or Cathy Bosi (866-4679) a call.

/s/ Karen Rezanka
Karen Rezanka

[Chart On Restructuring – Impacts And
Impact Of Additional Costs Or
(Savings) For Major Items Omitted In Printing]

To: BTOWER:THIPF
From: PBLIZZAR
Subject: Employee Numbers
Date: 11-15-94 Time: 5:26p

Originated by : PBLIZZAR 11-15-94 5:13p
Forwarded by : PBLIZZAR 11-15-94 5:26p (CHANGED)

Listed below are the numbers I have for the employees who have left in the various programs:

1. Redeployment: (Oct. 93 to May 94) 230 regular employees (Note: I do not have a list and Edna Jones, who has the only list, is out sick today; therefore, I cannot break it down into exempt and non-exempt.) 117 Bargaining unit employees were laid off, but 64 were rehired as casual or temporary employees.

2. Early retirement: (Jan-Feb., 1994) 178 regular employees (151 exempt employees, 27 non-exempt (hourly)). No bargaining unit employees.

3. Career Transition: (Oct, 1994 and continuing through 1995) 182 regular employees (116 exempt employees, 66 non-exempt (hourly)). Approximately 70

bargaining unit positions will be terminated, but because of seniority and "Rolling" into other positions, it is unknown at this time how many bodies will leave as a result of those 70 positions being eliminated. It is also anticipated that an additional 50 positions of regular employees will be eliminated after January 1.

TOTAL: 740 regular employees; 187 bargaining unit employees. In addition, a number of vacant positions also have been eliminated.

[LOGO] **Florida Power**
CORPORATION

INTEROFFICE CORRESPONDENCE

Legal Department	A5C	231-4164
OFFICE	MAC	TELEPHONE

SUBJECT: Early Out and Redeployment Tracking

TO: J. H. Richardson DATE: September 15, 1994

Attached for your review are two copies of the Position Complement Summary, the Summary-Early Out Tracking and the Early Out Tracking Detail Reports.

The Early Out Tracking is nearly completed. There remains only one outstanding position, Russell R. Schoetker, in Mr. Phillips' area. A copy of Mr. Phillips' report is attached for your information. I have not provided other departments' reports since they are completed.

With regard to the Redeployment List:

Mr. Beard – All positions have been abolished as required to date.

Mr. Hancock – All positions have been abolished as required to date.

Mr. Henry – All positions have been abolished – Completed (no copy attached).

Mr. Miller – All positions have been abolished as required to date.

Mr. Richardson – All positions have been abolished as required to date.

Mr. Phillips – Two positions are due to be abolished. (Davis and Paulsen). All other positions have been abolished as required to date.

If you have any changes or questions, please give me a call.

P. A. Brown

cc: E. Jones
P. Burmaster

POSITION COMPLEMENT SUMMARY AS OF 8/31/94

TOTAL	Regular	Authorized	Filled	Authorized/ Filled Variance
	12/31/93	5990	5755	235
	08/31/94	5443	5176	267
		547	579	
	Temporary			
	12/31/93	145	122	23
	08/31/94	135	114	21
		10	8	
	Part-Time			
	12/31/93	81	43	38
	08/31/94	64	47	17
		17	4	

POSITION COMPLEMENT SUMMARY AS OF 8/31/94

TOTAL	Regular	Authorized	Filled	Authorized/ Filled Variance
	12/31/93	5990	5755	235
	08/31/94	5443	5176	267
		547	579	

Temporary			
12/31/93	145	122	23
08/31/94	135	114	21
	10	8	
Part-Time			
12/31/93	81	43	38
08/31/94	64	47	17
	17	4	

[Redeployable Program Report As Of September 30, 1994 Omitted In Printing]

REDEPLOYABLE PROGRAM STATS

PARTICIPANTS:

Supervisors, Managers, Directors		16
Exempts		33
Non-Exempts		81
- Others	56	
- Bldg. Mgmt.	25	
TOTAL		130

Separated from the Program:

- Internal placement	3
- External placement	5

Redeployable Workshops:

- Internal	9
- External (special)	2

REDEPLOYABLE RESOURCES – FINAL – MAY 25, 1993

- No poor performance or problem employees in redeployable group – deal with them now outside of this business process improvement.
- It is Line Management's responsibility to successfully manage their redeployable employees. Human Resources will provide assistance in retraining efforts and outplacement service as part of this partnership.
- Employee can be identified as redeployable by:

  – Position reduction due to business process improvement.

  – Position reduction at holding company.

  – Position reduction resulting from organizational realignment.
- Individual stays in "current" role until *new business process* is implemented.
- Redeployable employees *may* be offered reasonable retraining if necessary to qualify for internal positions.
- Redeployable employees remain at current salary for up to six months or until one of the following occurs:

  – Accepts new job offer. If current salary greater than 120% of new job market value, salary will be reduced to the lower amount.

  – If voluntary termination, remainder of six month's salary paid.

  – As a result of placement process individual accepts internal job offer. If external job secured, remainder of six month salary will be paid.

  – Separation at six months after date declared redeployable.

- Non-exempt and exempt employees who are redeployable will be given consideration for all posted job openings prior to official posting using following process:

  – A redeployable individual has to initiate application for job opening.

  – Hiring supervisor and responsible Senior V.P. has to justify why redeployable applicant is not qualified *to* the present supervisor and supervisor's responsible Senior V.P.

  – If disagreement, goes to President for final review and decision.

- Redeployable employees remain in their department and in the department budget until "six months" event occurs as described earlier. They may be assigned other duties by their departmental management or reassigned to different duties outside their department prior to full-time reassignment to a new position. Where possible, unless assigned to duties elsewhere, redeployable employees should remain in their work area – though *not* in the new business process.

- Redeployable employees should not go through an assessment center process or formal assessment. However, if disagreement over qualifications exists, then a modified targeted selection process will be used.

- HR will do continuous adverse impact analyses and inform senior management of any issues as they arise.

  – Evaluate who is being declared redeployable.

  – Who gets job offers.

  – Who actually is released from Company.

- Bargaining unit employees whose positions are eliminated will not be covered by this process but will be treated consistent with our union contract.

NOTE: DO NOT SEND OUT ANY WRITTEN NOTIFICATIONS OR PUBLICATIONS OF THIS PROGRAM. DO DISCUSS WITH YOUR STAFF AND FEEL FREE TO ANSWER EMPLOYEE QUESTIONS. IF REDEPLOYABLE EMPLOYEES IDENTIFIED, CONFIRM WITH SENIOR V.P. OF THAT AREA.

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE PROGRAM

TO: Joe Richardson

DATE: October 25, 1993

Per our conversation today on the Redeployable Program, I have learned that decisions are being made and communications planned for the employees impacted prior to review by my department. This is not in accordance with the agreement we made when the program was approved. Any department desiring to place individuals into the Redeployable program should contact me in order to review the candidates and ensure none are poor performers. Once I have given approval and senior management concurs, we schedule the employees to be

informed by the immediate supervisor and orientation with myself or Dean Montgomery. In some instances, this is not occurring.

Please remind the senior management team of the above in order to continue to have a well managed and positive program. If there are any issues or concerns, please call me.

/s/ Edna
Edna C. Jones

xc: G. M/ Rickus, Jr.
H. D. Montgomery

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

WORK FORCE DIVERSITY	D2A	231-4130
OFFICE	MAC	TELEPHONE

SUBJECT: REDEPLOYABLE REPORT

TO: Joe Richardson

DATE: November 3, 1993

Attached you will find the report for the month of September, 1993 on the Redeployables and poor performers. This report will be submitted to you by the **10th working day** of the month. If you have any questions, please call.

/s/ Edna
Edna C. Jones

xc: George M. Rickus, Jr.
[Joe –
Does this meet your needs?
/s/ [Illegible]
check total FPC #]

[LOGO] Florida
Power
CORPORATION

INTEROFFICE CORRESPONDENCE

Work Force Diversity	A5C	231-4164
OFFICE	MAC	TELEPHONE

PERSONAL &
CONFIDENTIAL

SUBJECT: Redeployment Process Recommendations

TO: George Rickus

DATE: March 31, 1993

Attached is the Redeployment Process Presentation and recommendations as to how a third-party provider (outplacement firm) will support our efforts. As noted in the presentation, the majority of redeployable employees will participate in our in-house career transition workshops.

We recommend, as identified on pages 4 and 5, only senior management redeployable employees will be referred to an outplacement firm. Those firms providing initial responses to our requests fully understand these employees will be searching for job leads internally and

externally simultaneously. Further, they will provide specific status reports on each client referred.

The internal process is well defined and to ensure the absolute partnership expectations with the third-party, the following elements need to be clarified. It is recommended that Drake Beam Morin, Inc. and Right Associates have an opportunity to respond to the following questions. They both presented focused proposals and competitive pricing schedules. [ok]

[Timing to finalize]

1. Redeployable employees at a market value of $82,000 and above [How about others?] will be referred to a third-party. What pricing schedule will be offered for these referrals?

2. Redeployable employees referred directly to a third-party provider will continue to job search internally with Florida Power; and subsequently, may secure an internal position rather quickly. Accordingly, what kind of rebate will be guaranteed to Florida Power should a limited amount of counseling service be provided?

3. Relative to a contingency plan, we need assurance that the provider can respond within a two-day period to conduct workshops to handle any overload situations. Can they confirm this request?

4. What services (and fee arrangement) can be provided to develop external job leads locally and nationally to support those employees participating in Florida Power's in-house sessions?

If this meets with your approval, I'll send the questions immediately [ok] to both vendors. Additionally, it might

make sense to provide them a copy of our defined process for clarification and reactions.

/s/ Dean Montgomery
H. Dean Montgomery

[Redeployment Process, Presented By Work Force Diversity, March 1993 is Reproduced *supra* at Pages 225-235.]

REDEPLOYMENT PROCESS FORM

- CONFIDENTIAL -

To: Edna C. Jones (D2A) From: _____

Employee: _____ Phone: ( ) __-_____

Position Title: _____ Social Security Number: __-__-_____

Work Location: _____

Hire Date: _____ Phone: ( ) __-_____

Salary: _____ (Monthly)

Redeployment Process Starts: _____

Redeployment Process Ends: _____

The Redeployment Process has been explained to me and I fully understand my responsibilities in locating and

securing another position within Florida Power Corporation or externally with another firm. I further understand there is a one year limit placed on this process.

_____/___ _____/___
Employee Signature Date Human Resources Representative Date

EXHIBIT R

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Career Transitioned Employees

TO: Senior Staff

DATE: August 3, 1995

FROM: P. K. Blizzard
/s/ PK Blizzard

Attached is a list for your information of all employees who have gone through the Career Transition process in 1994 and 1995. These employees are sorted by senior staff code as follows:

1994 Codes	1995 Codes
2 Kuzma	0 Keesler
3 Beard	1 Conner
4 Phillips	2 Heinicka
5 Richardson	3 Beard
6 Hancock	4 Richardson
7 Miller	5 Stanfield
8 Henry	6 Hancock
9 Conner	7 Miller
	8 Foley
	23 Warner
	A Toomey
	B Blizzard

I am providing these lists at your request so you know which employees in other departments have left the company. Please contact me if you should have any questions.

PKB:mf

Attachment

EXHIBIT S

(LOGO) Florida Power CORPORATION

INTEROFFICE CORRESPONDENCE

Human Resources (OFFICE) A7A (MAC) 231-4298 (TELEPHONE)

SUBJECT: Career Transition Employees

TO: R.Korpan
A.J.Keesler
Senior Officers

DATE: November 13, 1994

FROM: P.K.Blizzard
/s/ P.K.Blizzard

Several of you have requested a list of employees who have received notification of termination under the Career Transition program. Attached is the list, per Senior Officer. To date, 1831 employees have received the Career Transition package. An additional 20 employees are on the Master List to receive the package, and other employees will be notified as process analyses are completed. To prevent any accidental premature notification, I have blanked out the names of those employees with notification dates after this correspondence. It is possible that some of those employees already may have been notified; however, I erred on the side of caution.

I have made notations on the side of the lists as follows:

W	A release was signed, waiving the right of the employee to litigate the termination.
R	Retirement.
XW	The employee rescinded the release.
N/A	Not applicable; i.e., the employee was terminated prior to the package development.

The employees have up to 45 days from the date of receipt of the release to sign it. They then have 7 days to revoke their signed release. Those deadlines have not yet passed for any employee. As of November 8th, all but 26 employees had signed the release, and only one had revoked his signed release. Six of those not signing were retirees.

Please contact me if you have any questions or find any errors.

CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name	
W	BASSA, PHILIP	477-46-3730	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	BRANNON, JOE N	286-32-8725	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	CHASTAIN, BARRY L	449-76-0056	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	CLARK, JAMES W	185-38-7963	10/28/94	3	2700	NUCLEAR OPERATIONS	N
	DELCASTILLO, MARTIN	264-35-8411	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	DORRIE, RICHARD S	145-36-9657	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	GARG, NARENDRA K	153-50-4333	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	GREATREX, DIANE E	264-72-6535	10/28/94	3	2700	NUCLEAR OPERATIONS	N
	HEGDE, GOPAL N	383-66-7949	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	LAMM II, GERALD E	234-74-1158	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	LOW, RICHARD H	536-42-4383	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	MASCOLL, JOHN O	413-23-9226	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	MURKERSON, EVELYN M	263-64-8293	11/10/94	3	2700	NUCLEAR OPERATIONS	E
W	NEAMAN JR, THOMAS J	072-34-6101	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	PASSMORE, WILLIAM L	254-52-4476	10/28/94	3	2700	NUCLEAR OPERATIONS	E
W	ROSS, PRESTON A	227-19-9207	10/28/94	3	2700	NUCLEAR OPERATIONS	E
	SKALA, JIRI	282-56-8704	10/28/94	3	2700	NUCLEAR OPERATIONS	E
XW	TABUTEAU, A ERIC	122-44-0545	10/28/94	3	2700	NUCLEAR OPERATIONS	E

277

16 Exempt
2 Non-exempt

CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name	
W	ACTON, J LORRAINE	276-52-3418	10/28/94	6	2196	BUSINESS SYSTEMS S	N
	BARNES, ELAINE R	262-82-5071	10/28/94	6	2537	PERFORMANCE SERVIC	E
R- W	BELL, BRUCE A	266-42-1079	10/28/94	6	2542	TECHNICAL SERVICES	E
R	BIRCH, DONALD C	267-40-8928	10/28/94	6	2537	PERFORMANCE SERVIC	E
W	BREEDEN, DONALD L	172-32-7612	10/28/94	6	2578	C R COAL PLANT -SI	E
	BROWN, RICHARD H	198-32-3470	10/28/94	6	2542	TECHNICAL SERVICES	E
W	CATLETT JR, THOMAS J	227-50-4829	10/28/94	6	2577	C R COAL PLANT - 1	E
W	CHOATE, LOUISE M	288-50-6794	10/28/94	6	2196	BUSINESS SYSTEMS S	N
W	HARRISON, RICHARD L	266-58-9403	10/28/94	6	1230	FUELS SUPPLY DEPAR	E
R- W	HART, WILLIAM J	263-58-7952	10/28/94	6	2531	LABOR RESOURCES	E
W	HOLTON, JAMES O	265-82-8395	10/28/94	6	2537	PERFORMANCE SERVIC	E
	MOORE, MICHAEL E	510-50--8724	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
	MORRIS, DAVID B	019-34-2679	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
W	PRYSLAK, THOMAS M	063-40-8230	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
W	PUTNAM JR, TRAVERS D	262-90-2052	10/28/94	6	1230	FUELS SUPPLY DEPAR	E
R- W	RICHARDSON, W B	250-38-2472	10/31/94	6	2578	CR COAL PLANT - SI	E
W	STEMLEY, RODNEY GLEN	435-90-6493	10/28/94	6	2537	PERFORMANCE SERVIC	E
	URBAN, ROBERT A	375-48-9500	10/28/94	6	2510	ENGY SUPPLY PLANT IMPROV	E
	WIMS, JAMES L	266-53-6322	10/28/94	6	2578	C R COAL PLANT -SI	E

278

CONFIDENTIAL

	Employee Name	SSN	Term Date	Sen. VP	Dept. Num	Department Name
	ADAMS, CHARLOTTE S	426-68-6451	4/30/95	2	1160	CUSTOMER ACCOUNTIN
	BARGAR, STEPHEN R	265-11-8349	3/31/95	2	1170	PLANT AND DEPR ACC
W	BENNETT, PATRICIA J	208-34-8085	10/28/94	2	1130	ACCTS PAYABLE & DI
	BRATCHER, SUSAN H	262-17-1757	3/31/95	2	1160	CUSTOMER ACCOUNTIN
	BRIER, TANDY L.	206-36-6496	3/31/95	2	1101	FINANCIAL REPORTIN
	CAIN, DEBORAH M	266-11-4409	3/31/95	2	1170	PLANT AND DEPR ACC
	COOK, GERTRUDE B	218-24-9964	1/31/95	2	1140	PAYROLL
W	GRIMES, PAMELA A	262-17-4701	10/14/94	2	1090	BUSINESS PLANNING
	HEY, LINDA M	265-11-9136	1/31/95	2	1101	FINANCIAL REPORTIN
	JAKEL, FRANCIS J	166-34-0700	1/31/95	2	1130	ACCTS PAYABLE & DI
	KINZEL JR, KENNETH A	261-23-0728	11/28/94	2	1115	PRINTING SERVICES
W	MATHERS, MICHAEL R	269-40-3956	10/14/94	2	1090	BUSINESS PLANNING
	MCWILLIAMS, DEVERE A	406-54-4663	3/31/95	2	1170	PLANT AND DEPR ACC
	PFISTER, WADE R	263-96-6263	12/1/94	2	1170	PLANT AND DEPR ACC
	SCHILLO, BARBARA A	265-94-5125	3/31/95	2	1120	REGULATORY ACCTG
	SCHOBEL, TERRY L	261-29-8769	10/28/94	2	1101	FINANCIAL REPORTIN
W	SHANNON, TERRANCE F	267-75-9405	10/28/94	2	1115	PRINTING SERVICES
	SHIFLETT, R DARWIN	526-48-9611	6/30/95	2	1160	CUSTOMER ACCOUNTIN
	SNIDER, SARAH A	266-04-0548	3/31/95	2	1170	PLANT AND DEPR ACC

Electric Fuels Corporation
Career Transition

Name	Employment Date	Effective Date
Kris L. Carlson	4/27/93	7/31/96
Sherilyn K. Crittenden	9/26/94	7/31/96
Marilynn S. Duncan	7/27/92	7/31/96
Debbie Ericksson Perry	5/01/89	7/31/96
Sylvia R. Glenn	8/17/92	7/31/96
Michele M. Migeot	5/04/92	7/31/96
Larry W. Moore	9/06/94	9/30/96
Margaret M. Nyland	5/18/92	7/31/96
Darcy L. Stafford	1/11/94	7/31/96
Lynden F. Valentine	12/18/89	7/31/96

[EXHIBIT T – Plaintiffs' Answer to Interrogatories Omitted In printing]

[EXHIBIT U – Plaintiffs' Affidavits Omitted In Printing]

EXHIBIT V

UNITED STATES DISTRICT COURT
IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

JAMES AKIN, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION, et al.

Defendants.

CASE NO.
97-173-Civ-Oc-10C

WANDA L. ADAMS, et al.,

Plaintiffs,

vs.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Defendants.

CASE NO.
95-123-Civ-J-10A

AFFIDAVIT OF SUSAN LONG, PH.D.

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

BEFORE ME, the undersigned officer, duly authorized to administer oath, appeared SUSAN LONG

well known to me who upon oath says and deposes as follows:

1. My name is SUSAN LONG, and I am over the age of eighteen.
2. I hold a bachelor's degree in finance received from Syracuse University in 1971 and a doctorate in statistics, economics and finance received from the University of South Carolina in 1976.
3. I have been qualified as an expert in the field of statistics and economics for over ten (10) years. *See Resume attached as Exhibit A.*
4. I have testified in over fifty (50) cases for both the defendants and plaintiffs in state and federal court.
5. I have been asked to assume that the statistical evidence supplied to me is valid.
6. It is my opinion that in cases involving large scale Reduction in Force or downsizing the process is by its very nature a "Top-down" process, originating from senior management and carried out by those at lower levels. Further statistical analysis needs to be conducted which takes into account the entire population of the employees so that reliable data can be proffered as to the disparate impact on the Plaintiffs regardless of whether a subjective or objective process was used.
7. Pursuant to my review of the documents provided to me by the Plaintiffs in this matter, and my experience as an expert in the field of statistics, it is my opinion that Florida Power's corporate leaders and senior management set the parameters for the Reduction in

Force and downsizing process that occurred at Florida Power and directed the lower levels to carry out these directives which resulted in the disparate impact upon Florida Power's older employees.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Susan Long
SUSAN LONG, PH.D.

SWORN TO AND SUBSCRIBED before me, by SUSAN LONG who is either personally known to me or who has produced DRIVER'S LICENSE as identification, this 24th day of SEPT., 1998.

/s/ Cheryl A. Scalzo
Notary Public, State at Large
My Commission Expires:

[SEAL]
CHERYL A. SCALZO
MY COMMISSION #CC 732243
EXPIRES: April 8, 2002
Bonded Thru Notary Public Underwriters

EXHIBIT A

Susan W. Long, Ph.D.
P.O. Box 9793, Tampa, Florida 33674-9793 -
(813) 234-7144 - FAX: (813) 232-0061 - e-mail:
SWLong@email.msn.com

Dr. Susan W. Long is president of S.W. Long and Associates, a litigation support business located in the Tampa Bay area. Dr. Long does economic valuations for divorce, personal injury, wrongful death, wrongful discharge, discrimination, business damages, labor and Employment law and other litigation-related issues. She also does the statistical analysis for employment discrimination. She has qualified in court as an expert witness in most Florida Counties as well as Richland County in South Carolina, St. Mary Parish in Louisiana, Harris County in Houston, Texas, federal court and tax court.

Dr. Long received her Ph.D. in finance economics and statistics at the University of South Carolina in 1976. She was a university professor in statistics, economics and finance from 1975 through 1989. While teaching full-time Dr. Long provided expert economic and statistical testimony on litigation issues on a part-time basis. In 1988, Dr. Long began providing litigation support on a full-time basis.

Dr. Long is licensed by the state of Florida in Real Estate. She is a member of the Institute of Business Appraisers and an Associate Member of the Hillsborough County Bar Association. She was the founding president of the West Central Florida Chapter of the Institute of Business Appraisers.

Dr. Long is listed in Who's Who in the Southeast, Who's Who of Emerging Leaders and Who's Who Women of the World. She is a frequent contributor to *Fair$hare*, a journal in matrimonial law.

Dr. Long's professional publications include articles on economic losses in personal injury, how to handle illiquidity in equitable distribution, pension valuation, business declines during divorce and economic losses in personal injury and business litigation. In addition, Dr. Long has published numerous articles in areas of corporate finance, portfolio management and applied statistics. Dr. Long has been an invited speaker at the Financial Management Association, the Hillsborough County Bar Association's Marital Law Section, Hillsborough County Bar Association's Solo Practitioner's Section, the Professional Association of Professional Investigators, Eastern Finance Association and numerous other professional associations.

Susan W. Long, Ph.D.
P.O. Box 9793, Tampa, Florida 33674-9793 - (813) 234-7144
- FAX: (813) 232-0061
e-mail: SWLong@email.msn.com

EDUCATION:

Ph.D.	University of South Carolina (1976) Concentration: Finance, Economics and Statistics
M.B.A.	University of South Carolina (1975) Concentration: General Business

B.S. Syracuse University (1971)
Concentration: Major - Finance; Minor - Statistics;
Minor - Data Processing

PROFESSIONAL EXPERIENCE:

Consultant:

1991-Pres. **S.W. Long & Associates.** Business Appraisals, Pension Valuation, Business Damages, Economic Losses in Personal Injury, Wrongful Death and Medical Malpractice. Statistical Analysis in Labor and Employment Law, Valuation of Business Damages, Valuation of Lost Services. Determination of Effective Interest Rates. Qualified in circuit, state and federal courts as an expert.

1982-1996 **Private Consulting practice.** Financial and Economic Consulting in Business Valuation; Pension Valuation; Business Damages and Personal Injury. Qualified in circuit state and federal courts as expert.

1978-1982 **C & S Research Associates**, Ypsilanti, Michigan. Statistical and Financial Consulting for political candidates and business entities.

Banker:

1971-1972 **Bankers Trust of South Carolina**, Columbia, South Carolina. Sr. Financial Analyst. Acquisition Analysis, Budgeting, Competitor Analysis.

Teaching:

1997-Pres. **University of Sarasota**, Sarasota, Florida. Associate Professor of Finance. Teach and do research in finance and statistics at Masters and Doctoral level.

1996 **St. Leo College**, St. Leo, Florida. Adjunct Professor of Finance.

1991 **University of Tampa**, Adjunct Professor of Finance, Tampa, Florida.

1990-1991 **Webber College**, Visiting Professor of Finance, Babson Park, Florida.

1982-1988 **University of South Florida**, College of Business Administration, Associate Professor of Finance.

1978-1982 **Eastern Michigan University**, College of Business, Associate Professor of Finance.

1975-1978 **East Carolina University**, College of Business, Assistant Professor of Finance.

OTHER EXPERIENCE:

* Trial testimony in municipal, circuit, state, and federal courts on various actions including business valuation, financial & economic analysis, pension valuations and economic losses in personal injury, wrongful death, age and sex discrimination.

* Organized, developed and participated in professional development programs in statistics, finance and finance related areas for various organizations including

American Banker Association, Credit Women International, and Women's Political Caucus.

* Secretary, Tampa Bay Chapter of ASA, 1994-1996, Director Mentor Program, Houston Chapter ASA, 1996-1997.
* Board of Directors, Tampa Crossroads, 1995-Present.
* Successfully completed training in Family Law Mediation, 1994.
* Successfully completed ASA certified course in Unified Standards of Professional Appraisal Practices, 1994.
* President, West Central Florida Chapter - IBA, 1992-1994
* Director, Whitestone Consulting Group, Inc., financial and economic consulting firm, 1988-1991.
* Editor: FMA Collection, 1983-1991.
* Treasurer, Air Care Alliance, Inc., 1991-1996.
* Treasurer, Angel Flight of Florida, Inc., 1984-1992; Director, 1984-1996.
* Reviewer: Journal of Financial Research, 1977; and Decision Sciences, 1984, 1986-1988, Journal of Accountancy, 1993.
* Program committee, Midwestern Finance Association (1986) and Eastern Finance Association, 1985 & 1988.
* Created and maintained WEDU'S Florida Based Stock Market Index, 1982-1985.

* Licensed in Florida (1988-Pres) and Texas (1996-Pres) Real Estate.
* Member American Arbitration Association Panel of Arbitrators.
* Initiated and organized the first Battered Spouse Safe House in E. North Carolina.

HONORS/AWARDS/MEMBERSHIPS:

* Member Omicron Delta Epsilon, National Economics Honorary
* Professional membership in Institute of Business appraisers.
* Treasurer, Executive Women in Sales and Marketing (1990-1992).
* Treasurer, Tampa Bay Network, National Association of Female Executives (1990-1991).
* Member Alpha Iota Delta, National Honorary in Decision Sciences (Treasurer 1981-82).
* Grace Vedder Fellow, Syracuse University (1970-1971).
* Who's Who Women of the World, 1982, 1989, Who's Who Women of the South, 1991, 1993, 1995, Who's Who Emerging Leaders, 1991.
* Treasurer, Vestryman and Building Committee, St. Mark's Episcopal Church, 1986-1988.
* Founding Director and Secretary, The New Cherokee Club of Ybor City, Tampa, 1990-1991.

SELECTED PUBLICATIONS:

"Problems in Equitable Distribution of Personal Injury Awards," Family Law Commentator, Florida Bar Association, Summer, 1994, Co-authored.

"Checklists for Military, Civil Service, and Civilian Pension Valuation Information, Fair$hare, Prentice Hall Law & Business, December, 1993.

"The Expert's Frustration with the Attorney," Lawyer, Hillsborough County Bar Association, October, 1992.

"Personal Injury Losses: The Economic Realities that are Obvious (Obscure)," National Forensic Center Journal, Summer, 1992, (co-authored).

"Understanding a Decline in Business Value During Divorce," FAIR$HARE, Division of Prentice-Hall, 1992, (co-authored).

"Handling Illiquidity in the Actual Distribution," FAIR$HARE, Division of Prentice-Hall, May, 1991, (co-authored). Reprinted in Encyclopedia of Matrimonial Law, Prentice-Hall, 1992

"Problems in Easy Pension Valuations," TRIAL, April, 1991, (co-authored).

"A View from the Big Guava," Florida Growth Report, monthly economic column, February 1991-February, 1992, (co-authored).

"Pension Valuation", FAIR$HARE, Division of Prentice-Hall, February, 1991, (co-authored). Reprinted in Encyclopedia of Matrimonial Law, Prentice-Hall, 1992.

"Economic Losses in Personal Injury from the Obvious to the Obscure," Experts-At-Law, July-August, 1991, (co-authored).

"A comment on the Application of corporate Finance to the Courtroom: The Case of Damage Valuation," Financial Management, Spring, 1990, (co-authored).

"An Analysis of the Effects of Bank Mergers," Journal of the Midwest Finance Association, 1987.

"A Note on Cyclical and Dynamic Aspects of Stock Market Price Cycles," Financial Review, Summer, 1986, with S. Bolten.

"Deferred Taxes: Do They Smooth and Deflate? – Abstract," Financial Accounting, Spring, 1985, with Steven Bolten.

"Risk-Premium Curve v. Capital Market Line: Differences Explained," Financial Management, Spring, 1978.

"The Invalidity of Beta," Proceedings of the 1982 Southwestern Finance Association Meeting, Dallas, Texas, March, 1982.

"Measuring the Responsiveness of New Equity Issues to Risk and Return," Proceedings of the 14th Annual Meeting of the Eastern Finance Association, Atlanta, GA, April, 1978, with Jerry Hunt.

"A Note Extending Risk-Premium Analysis to Convertible Bonds and Real Estate," Proceedings of the 1978 Annual Meeting of Southeastern American Institute of Decision Sciences, Jacksonville, Florida, February, 1978, with Richard Stevenson.

"An Empirical Test of Inter-industry Changes in Financing Mix," Proceedings of the 1978 Southwestern Finance Association Meeting, Dallas, Texas, March, 1978 with Jerry Hunt.

"Inter-industry Changes in Financial Position," Proceedings of the 13th Annual Meeting of the

Eastern Finance Association, Boston, Massachusetts, April, 1977, with Jerry Hunt.

Ph.D. Dissertation - "Market Indices and Their Effects on Betas," 1976.

SPEECHES, PAPERS AND MEETINGS:

"Experts: How to Find Them and Keep their Costs Down," Speech given to Hillsborough County Bar Association, Solo Practitioners Section, November, 1993.

"Valuing Your Business," Speech given to Town 'n Country Rotary, Spring, 1993.

"Finding Value in the Small Business," Speech given to Professional Association of Private Investigators Annual Leadership Conference on Fraud, October 2, 1992.

"The Pitfalls of Entrepreneurship", Speech given to Women Business Owner's 1st Annual Conference on Entrepreneurship, September, 1992.

"Pension Valuation," Speech given to the Marital Law section of the Hillsborough County Bar Association, September, 1990.

"Analysis of Factors in Bank Mergers and Acquisitions," was presented at the Southern Finance Association Meetings, New Orleans, Louisiana, November, 1986, (co-authored).

"Synergism in Bank Mergers and Acquisitions," Southwest Finance Association, Houston, Texas, March, 1987, (co-authored).

"Bank Mergers and Acquisitions," Eastern Finance Association, Baltimore, MD, April, 1987, (co-authored).

"The Appropriate Market Holding Period for Portfolio Performance Measures: Evidence from the Decomposition of the cycle," Eastern Finance Association, Nashville, TN, April, 1986, (co-authored).

"Constructing a Local Stock Market Index: A Case Study," Eastern Finance Association, Buena Vista Village, FL, April, 1984, (co-authored).

"Beta: How Much Information Does It Contain?" North American Economics and Finance Association, Mexico City, Mexico, July, 1984 (co-authored).

Annual attendance at various professional meetings and seminars since 1975.

References and Client List upon Request.

[**EXHIBIT W** – Affidavits from Plaintiffs, William E. Hoover, Richard G. Merriman, George Allen Suban, Chester Wagoner, and Janet E. Smith Omitted In Printing.]

[**EXHIBIT X** – Affidavit of Lorin Bryan Omitted In Printing.]

[**EXHIBIT Y** – Trial Testimony of David Miller in *Burke v. Florida Power*, No. 96-1184, Omitted In Printing.]

[**EXHIBIT Z** – 1992 Evaluations of Jim Smith, Janet Smith and Doug Janowski Omitted In Printing.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
OCALA DIVISION

WANDA ADAMS, ET. AL.,

Plaintiffs,

v.

CASE NO.:
95-123-CIV-OC-10A

FLORIDA POWER CORPORATION, and FLORIDA PROGRESS CORPORATION,

Defendants.
_____/

PLAINTIFFS' AMENDED RESPONSE TO DEFENDANT'S MOTION TO DECERTIFY AND INCORPORATED MEMORANDUM OF LAW

COMES NOW, the Plaintiffs, WANDA ADAMS, et al, by and through their undersigned attorney, and submits this Response to the Defendant's Motion to Decertify this case as a class action and says that the Defendant's Motion should be denied.

STATEMENT OF THE CASE

This case was originally filed in 1995 by seventeen (17) original Plaintiffs. Later thirty-nine (39) additional Plaintiffs were allowed to join this lawsuit by amendment. The case was then conditionally certified and sixty-one (61) former employees of the defendant opted in to

this age discrimination lawsuit.[1] In the Court's Order that was entered on June 22, 1998, the Court did dismiss all of the ERISA claims of the Plaintiffs. The claims now pending before the Court are the Federal ADEA claims of all Plaintiffs except Boyle, Engers, Maraget and Owens, and all of the State discrimination claims under the Florida Civil Rights Act of 1991 alleging age discrimination, and these are pending for all Plaintiffs.

PLAINTIFFS' FORECAST OF THE EVIDENCE AS IT RELATES TO CLASS CERTIFICATION

In May of 1992, the Defendants, Florida Progress Corporation and its wholly owned subsidiary, Florida Power Corporation purported to make a decision to

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[1] The Court dismissed the ADEA claims of Plaintiffs Boyle, Engers, Maraget and Owens. The Court did not dismiss the age discrimination claims of Boyle, Engers, Maraget and Owens that were filed under the Florida Civil Rights Act of 1991, *Fla. Stat.* §760.01-760.11. The claims of Boyle, Engers, Maraget and Owens under *Florida Statutes* for age discrimination are the same as the other 111 plaintiffs who also have the same State claim for violation of the state age discrimination law.

The defendants state on page 4 of their motion to decertify, in footnote 1 that the court dismissed the FCRA claims of the original plaintiffs, Brannon, Cutlet, Gauldin, Janowski and Pennington. Nowhere in the Order entered by this Court on June 19, 1998, is there any mention of the Court dismissing the FCRA claims of the plaintiffs, Brannon, Catlett, Gauldin, Janowski and Pennington. The FCRA claims of those named plaintiffs are still pending before this Court. The Court only granted Florida Power Corporation's motion for summary judgment as it applied to the release that was signed and as the release applied to the FCRA claims. The FCRA claims were not dismissed.

downsize Florida Power Corporation. This single policy was implemented in the Fall of 1993. This policy was developed by the President of Florida Power Corporation in conjunction with Jack Critchfield, who is the President of Florida Progress Corporation. This policy, pattern and practice of age discrimination filtered down from the presidents of both corporations through various vice-presidents called a PACE Team and ultimately led to the termination of approximately 556 employees. Of the 556 employees, approximately 382 or 73% were over the age of forty.

STATEMENT OF PERTINENT FACTS

On May 22, 1992, Allen Keesler, Jr., who was the president of Florida Power Corporation prepared a memorandum for an organizational design task force implementing a strategic plan for Florida Power Corporation to reduce its work force with the goal of having in January 1994, the same number of employees that Florida Power Corporation had in January 1991. (See Exhibit "A")

On January 4, 1993, Allen J. Keesler, Jr., testified before the Florida Public Service Commission, under oath explaining his intent to downsize the company. (See Exhibit "B") Mr. Keesler passed this information through his senior officers and instructed them to come up with a way to reach his goals. (See Exhibit "B", pages 10 through 13) Mr. Keesler testified that his immediate staff was Mr. Green, Mr. Neiser, Mr. Phillips, Mr. Beard, Mr. Hancock, and Mr. David Miller. (See Exhibit "B", page 13)

Mr. Keesler's senior staff then utilized what was called a Senior PACE Team. Mr. John Hancock who was a

Senior Vice-President for the Florida Power Corporation also testified before the Public Service Commission on February 15, 1993. In his deposition, he testified that he, along with other senior staff officers were part of a PACE Team, and that they were responsible for working out the work force reduction plan or goal. (See Exhibit "C", page 6) Mr. Maurice Phillips, who was a senior officer and a part of the PACE Team drafted a memorandum dated September 21, 1992, which provided information regarding the position reduction targets. (See Exhibit "D") John Hancock testified that the things that were discussed by the PACE Team included better ways of identifying employees who were not pulling their weight and "I think emphasis on the point of are things that we are doing that perhaps in today's climate don't bring value added, and how we might deal with those." Mr. Hancock stated in his deposition that the PACE Team talked about concepts, approaches, feasibility in terms of making this long term achievement. (See Exhibit t [sic] "C", pages 12 and 14) Mr. Hancock testified in his deposition that he had seen the letter drafted by Maurice Phillips dated September 21st. (See Exhibit "D") Mr. Hancock also stated that "the PACE Team had agreed in concept as a Senior Management Team from the standpoint of what they wanted to go after." (See Exhhibit "C", page 15)

Maurice Phillips, who was an Executive Vice-President for Florida Power Corporation testified in his deposition before the Florida Public Service Commission that the reduction in force and the memo from Allen Keesler dated May 22, 1992, were areas of focus for the PACE Team. (See Exhibit "E", pages 7 and 8)

George E. Green, III, who was a Senior Vice-President for Florida Power Corporation was also part of the PACE Team. Mr. Green testified that the first meeting for the PACE Team was August 11th, that Allen Keesler came to the meeting, and that they discussed his goal to reduce the company at that time by 150 people. (See Exhibit "F", pages 5, 6, and 7)

The reason that the deposition testimony of Allen Keesler, John Hancock, George Green and Maurice Phillips are relevant to this Response is that one of the plaintiffs in this lawsuit, Patsy Yates Baynard, attended some of these same meetings. Ms. Baynard states in an Affidavit, (Exhibit "G"), that from 1990 through 1992 the Company started offering early retirement packages to employees in their fifties. It was made known to Ms. Baynard through Phil Henry, who was a Senior Vice-President of Engineering and Construction, that if she knew anyone who had been offered an early retirement package that they should take it, otherwise they would be the victims of downsizing.[2] Ms. Baynard also states in her Affidavit that in late 1992 and 1993 she was a member of the Strategic Planning Committee, which included Richard Korpan, Executive Vice-President of Florida Progress Corporation, Patricia Blizzard, Director of Environmental & Licensing Affairs, Susan Johnson, Director of Strategic Planning, Allen Keesler, President of Florida Power Corporation and Vice-Presidents, John Hancock, Richard Neiser, Joe Cronin, Maurice Phillips, Philip Henry and George Green. Ms. Baynard states that as a part of the

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[2] See Interrogatory Answer of Mark Foster in Exhibit U pp. 55-58.

preparation of the planning process, a statistical evaluation was completed on the work force to correlate age, years of service, cost of benefits and liabilities at the time of retirement. She states in her Affidavit that one of the goals was to get rid of older employees, reduce costs and bring younger employees into the work force. During one of the meetings at Howey-in-the-Hills, Florida, Mr. Korpan stated that "If employees had been with the company for over five years, they were part of the problem, rather than the solution to meet the competitive needs of the future." He also suggested that Florida Power needed to "get rid of older people," stating that "older people had nothing to contribute to the corporation," Ms. Baynard stated that the downsizing effort came from the highest levels of management of Florida Progress and Florida Power. (See Exhibit "G", page 3)

Another Plaintiff in this case, Cynthia Behrens-Boga, was a confidential secretary for Florida Power Corporation. She has stated in an Affidavit that there was what was commonly referred to as a "birthday book" distributed amongst directors and managers and Vice Presidents listing all employees alphabetically, and giving their dates of employment, social security number, salary and date of birth. She further states that the book was stamped "Confidential," and that she was told to keep the information in the book confidential. (See Exhibit "H")

This reduction in force started out in what was known as the redeployment process. In this progress employees were told they were being downsized, but that they could bid on jobs within the company. If they did not find a job with the company within six months, they

would be terminated. (See Exhibit "I") The Plaintiffs were replaced mostly by younger employees under 40 and of the Plaintiffs that did bid on other jobs within Florida Power Corporation, none were given any available positions. These Plaintiffs were qualified to do the jobs that they were doing and to do many other jobs which were available within the company. (See Affidavits of individual Plaintiffs – Exhibit "U") Indeed, no poor performers were even eligible to go into the redeployment program. (See Exhibit "K") The redeployment program was then changed to a career transition process. The only difference in the career transition process was that the employee signed a release and was terminated. The employee could receive up to six months of severance pay. Here again, no poor performers were eligible to participate in the career transition process. (See Exhibit "L")

The Plaintiffs did work in various positions throughout Florida Power Corporation. The Plaintiffs were not members of any bargaining unit and all were salaried employees. (See Exhibits "M", "N" and "O") While the Plaintiffs that were downsized worked at various positions and various departments at various locations for the Defendants, all had the following in common:

1) The Plaintiffs were all victims of the same single policy to reduce the older workers from the work force at Florida Power Corporation. This is evidenced by the depositions of Senior Executive Officers (See Exhibits A, B, C, and D) and the Affidavit of Patsy Baynard. (See Exhibit "G");

2) This same single policy continued through the redeployment and career transition process. This is evidenced by a memo from Pat Blizzard to Edna Jones dated November 16, 1994, where numbers are compiled for the three downsizing programs which were redeployment, early retirement, and career transition. (See Exhibit "P") The Plaintiffs in this case do not include employees who left in the early retirement program. See also a Memo to Pat Blizzard from P. Waters, subject "Career Transition Process" date 10/25/94, which breaks down the employees by age, race, and sex. (See Exhibit "Q") It might be noted in Exhibit "Q" that as of October 25, 1994, out of 209 employees downsized, 149 were over the age of 40;

3) In a Memo dated August 3rd, 1995, from Pat Blizzard to Senior Staff, there is a report given to Senior Staff, of employees who have gone through the career transition process. (See Exhibit "R") See also Memo dated November 13, 1994, from P.K. Blizzard to R Korpan and A.J. Keesler. (See Exhibit "S") This memo demonstrates that the downsizing and policy of age discrimination came from senior management and not middle management. See the attached Affidavit of Susan Long, Ph.D. (Exhibit "V") A large scale reduction in force or downsizing by its very nature is a top-down process carried out from senior management and carried out by those at lower levels. (*Id.*) Dr. Long also states in her Affidavit that, based upon the documents she reviewed, the Defendants' reduction in force and downsizing process had a disparate impact on Florida Power's older employees (*Id.*);

4) All of the Plaintiffs in this case were obviously over 40 years of age and most had a significant employment history with the Defendants;

5) At the time of their termination all were qualified for their jobs and were receiving satisfactory or better evaluations. (A fact evidenced by their eligibility for the career transition and redeployment programs.);

6) At the time of their termination most were replaced by younger people, less than forty years of age, with less experience and less time with the Company. (See Plaintiffs' Answers to Interrogatories marked as Exhibit "T". It might be noted that page 1 of Exhibit "T" is the interrogatory in question and the rest of the attachments are the answers to interrogatory number 1.) See also Composite Exhibit "W1" through "W5", which are Affidavits from Plaintiffs, William E. Hoover, Richard G. Merriman, George Allen Suban, Chester Wagoner, and Janet E. Smith;

7) All of the employees were told that their jobs were being eliminated. This was simply false. See Plaintiffs' interrogatory answers in Exhibit "T" and the Plaintiffs' Affidavits in Exhibit "U", which show that the majority of the jobs were not abolished.

8) All of the Plaintiffs were qualified and capable of doing other jobs within the company and other jobs were vacant and being filled. (See Exhibits "T" and "U");

9) None of the Plaintiffs were given jobs that they applied for or were told not to apply. (See Exhibits "T" and "U")

ARGUMENT AND MEMORANDUM OF LAW

The Plaintiffs have filed this age discrimination lawsuit under the Age Discrimination and Employment Act, 29 U.S.C. § 621 and the Florida Civil Rights Act under *Fla. Stat.* § 760.01 to § 760.11. The Plaintiffs' Sixth Amended Complaint makes it very clear that the Plaintiffs' claims are based on a pattern and practice of intentional age discrimination (disparate treatment) and that the Defendants' redeployment program and career transition process had a disparate impact on a protected class over the age of forty. The Complaint does not contain specific details applying only to individual Plaintiffs. The only facts that would apply to individual Plaintiffs are that they were the victims of a single policy of age discrimination, over the age of forty at the time of their termination, qualified for the jobs that they held, qualified for other positions within the Defendants' corporation, not allowed to obtain other positions within the corporation, replaced by younger people, and that the explanations offered by the defendants for the termination are pretextual.

It is interesting that the Defendants now attempt to cite poor performance on the part of some of these Plaintiffs as the reason for their termination. The claim conflicts with the Defendants' express policy that *no* poor performers were eligible to be placed in the redeployment program or receive a career transition package. (See Exhibits "K" and "L") An example is Lorin Bryan now accused of sexual harassment. The claim is false. (See Exhibit "X")

The only Plaintiff that has a claim that was even remotely different than the rest of the Plaintiffs, is Kermit

Lassiter. Kermit Lassiter has been severed by the Court and will be tried separately.

On page 9 of their Motion, the Defendants make reference to the Affidavit of David Miller. In Mr. Miller's Affidavit he states that the company needed to implement cost-cutting efforts to survive in the changing utilities environment. Mr. Miller also testified in the case of *Patrick Burke v. Florida Power Corporation*, in the Federal District Court in the Tampa Division, Case No. 96-1184. There, in Volume III, page 324 (Exhibit Y-1) of his trial testimony, Mr. Miller stated that Florida Power conducted no cost analysis whatsoever before downsizing. Mr. Miller now states in his Affidavit, "In the areas under my responsibility I asked my directors or department heads to determine the means by which they could reduce costs. I provided no instructions as to what methodology to use to accomplish the cost reductions." Mr. Miller testified in the *Burke* case that he used a banding process that he selected from Anderson Consulting to rank his employees. Again in Volume III. pages 304 and 305, (Exhibit Y-2) of the *Burke* trial transcript, Mr. Miller stated that he used the banding process, discussed it with his management team, and ultimately used it to rank his employees. Mr. Miller now states in his Affidavit that he was not reducing staff to cut costs, instead he was trying to address management concerns. In Volume III, pages 343 through 344, (Exhibit Y-3) of the *Burke* transcript, Mr. Miller testified under oath that in reorganizing or restructuring or downsizing one of his goals was to reduce

costs.[3] Mr. Miller states in his affidavit that he instructed his managers to meet in a group and to rank the employees, and that he wanted all of his managers who had experience with the employees to provide input. This is interesting in light of one of Mr. Miller's managers' testimony in the *Burke* trial. Mr. Wesley Strain testified in the *Burke* trial that he supervised three employees and that he had *never* heard of a banding process until after the employees had been laid off, and that he had no input into the banding. (Volume IV, page 484-485 Exhibit Y-4)

On page 22 of the Defendants' Motion, the Defendants allege that Jim Smith, Janet Smith, and Doug Janowski's positions were abolished. Each of these three Plaintiffs had approximately 20 years with the Defendant at the time of their termination. In their 1992 evaluations, they were rated either average or above average. (See Exhibits Z1, Z2 and Z3) All three were placed in the redeployment pool and were supposed to be able to bid on jobs that were available in the company. None of the Plaintiffs were given any available jobs with the Defendants.

The Defendants state that when the Plaintiff, Janet Smith was placed in the deployment pool she had not turned forty years of age. Ms. Smith was placed in the deployment pool and turned forty years old the next week. She remained employed with the Company and

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[3] David Miller was also a member of the same Pace team that organized this reduction in force. See Exhibits A,B,C and D; see also Exhibit U p. 151 and Exhibit Ab, which is a highlighted chart of the people over 40 terminated from Miller's department.

able to bid on other job, until June 1994, at which time she was terminated, as she was not offered any other job within the Company. At the time of her termination, the Plaintiff, Janet Smith, was 40 years and 6 months old. (See Exhibit "W-4")

The Defendants argue that the Plaintiff should not be allowed to proceed under the Florida Civil Rights Act as a Class. The Plaintiffs would submit that they should be allowed to proceed under the Florida Civil Rights Act as a class, as it pertains to liability. The only difference between the state statute prohibiting age discrimination and the federal statute prohibiting age discrimination is that the damages available under the state statute are broader. The Court has already suggested that if this case goes forward as a class that it would be a trial on liability. this can be tried under both state and federal law, as a class since the issues of law and the facts to be entered into evidence would be identical. (See Exhibit "J")

Next the Defendants raise the issue of whether the Plaintiffs should be able to piggyback on the Complaint filed with the EEOC by Janet Smith, claiming that charge was the earliest valid one that made a reference to targeting older, long-term employees. The Defendants are correct that the Plaintiffs should be allowed to rely on that charge, as Janet Smith was terminated from her employment with the Defendants after her fortieth birthday. The Defendants have not made any reference, however, to the charge of discrimination that was filed with the EEOC by William E. Hoover on April 5, 1994, five months before Janet Smith's EEOC charge was filed. On the last page of Mr. Hoover's charge to the EEOC, it states "in addition to

the Information Services Department, many other departments at Florida Power Corporation, have placed management and professional employees in the six-month redeployment process. The vast majority of these employees are over forty-five years old." This charge by Mr. Hoover also puts the EEOC and the Defendants on notice that the allegation of age discrimination is widespread throughout the Defendants' corporation. (See Exhibit "W-I")

The Defendants appear to be taking the position that if this case proceeds forward that it is somehow going to bankrupt the Defendants. It might be noted that in the last *quarter* of 1998 the Defendants had a *net* income of $77.8 million dollars from Florida Power Corporation alone. (See Exhibit "Aa") The Plaintiffs would submit that the potential damages in this case are irrelevant as it applies to whether or not this case should be certified as a class action.

Plaintiffs in this case have moved to collectively pursue their claim under § 7(b) of the ADEA (codified at 29 U.S.C. §626 b) incorporates the opt-in class action provision of the Fair Labor Standards Act §216 (b) provides that:

> An action to recover the liability prescribed . . . may be maintained against any employer in any federal or state court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

The leading case from the Eleventh Circuit is *Grayson v. K-Mart Corp.*, 79 F.3d (11th Cir. 1996). The *Grayson* court stated that "Plaintiffs need show only that their positions

are similar, not identical to the positions held by the punitive class." Furthermore, Congress has stated its policy that "ADEA plaintiffs should have the opportunity to proceed collectively." *Id.* at 1095. According to *Grayson*, the plaintiffs bear the burden of demonstrating a "reasonable basis for their claim of class-wide discrimination." The Plaintiffs may meet this burden, *which is not heavy*, "by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which 'successfully engage defendants' affidavits to the contrary."

The plaintiffs in this response have submitted sufficient affidavits and deposition testimony which showed that this was a single policy developed by top executives of Florida Progress Corporation and Florida Power Corporation which the defendants used to purge some of their middle management and professional positions of older employees. All of the employees were salaried and non-union.

A case on point, is *Thiessen v. General Electric Capital Corp.*, 996 F.Supp. 1071 (Dist. Ct. KS 1998). In *Thiessen*, the facts showed that there were significant differences among the opt-in plaintiffs, both in terms of employment situation and alleged discriminatory treatment. The opt-in plaintiff group consisted of individuals who held dozens of different positions (each with different requirements and responsibilities) across seven states. The plaintiffs ranged in age from 45 to 60 and ranged in tenure from 4 years to 31 years. They were supervised by many different individuals and they represented three of five salary grades with a range from $25,000.00 to $75,000.00 in salary. One thing that the court noted is that neither

the FLSA nor the ADEA defines "similarly situated," and the Tenth Circuit has not had the opportunity to discuss the meaning of the phrase. Indeed, very few circuit courts have addressed the appropriate standard for determining whether plaintiffs are similarly situated under §216(b).[4]

The defendant, in *Thiessen* argued that the plaintiffs were not similarly situated because of the vastly different employment situations and claims of the plaintiffs. The plaintiffs, in *Thiessen*, responded citing *Frank v. Capital Cities Communication, Inc.*, 1983 U.S. Dist. Lexsis 12947, No. 80-Civ-2188-CSH, 1983 W.L. 643 (7 Dist. NY Oct. 1983). In *Frank*, the defendants argued that the opt-in plaintiffs were not similarly situated because they held a wide variety of jobs and their specific complaints were not identical. *Id.* at page 2. Like Mr. Thiessen (and like the Plaintiffs here in this case before the Court), the Plaintiffs' theory was that each opt-in plaintiff had been the victim of "a plan by defendants to rid itself of its older employees through harassment and termination." *Id.* Although the court acknowledged that the claims of the opt-in plaintiffs were different, it reasoned that such claims "could all quite logically be manifestations of defendants' campaign."

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[4] Defendants rely on *Dybach v. State of Florida*, 942 F.2d 1562 (11th Cir. 1991). *Dybach* is not an ADEA case. It is a wage and hour case – with different elements, proof requirements and policy considerations.

Defendants also rely on *Brooks v. Bellsouth*, 164 F.R.D. 561 (N.D. Ala. 1995). In *Brooks*, the court denied the class because there was – unlike here – no evidence of a single plan.

Ultimately, the court certified 13 opt-in plaintiffs and stated:

> to deny them class treatment would be tantamount to declaring that any employer can escape ADEA class liability so long as it discriminates against a diverse group of aged employees over a wide geographic range in a number of ways, such as termination, salary, promotion, and working conditions.

The court in *Church v. Consolidated Freightways, Inc.*, 137 F.R.D. 294 (N.D. Cal. 1991) adopted the same reasoning in *Thiessen, supra* and went on to state that

> The court believes the better view is that a class claim is not defeated simply because the proposed class performed a variety of different jobs at different locations, reported to different supervisors or left employment for different reasons than the named plaintiffs. What governs the scope of the class is whether the named plaintiffs and the class members were all affected by a similar plan infected by discrimination. The plaintiffs need not be identically situated to potential class members. Citing *Heagney v. European American Bank*, 122 F.R.D. 125 (E.D. NY 1988).

This is precisely what Defendants, Florida Progress and Florida Power are now asking this Court to do, that is, to allow them to escape ADEA class liability because the Plaintiffs worked in various positions throughout the company.

The court, in *Thiessen*, adopted the holding in *Frank v. Capital Cities Communications Inc., supra* stating that Mr. Thiessen came forward with direct evidence of an overall

policy of purported age discrimination. The Plaintiffs now before this Court have done the same thing in this response.

In *Thiessen*, the Defendants argued that the case should be decertified because the defendant had various defenses available. In response the plaintiffs relied on *Hyman v. First Union Corp.*, 982 F. Supp. 1, 1997 (D.D.C. 1997). In *Hyman*, the opt-in plaintiffs were terminated in 1992 and 1993. The opt-in plaintiffs alleged termination decisions were based solely on age. The defendants argued that the case should not be certified because the plaintiffs were not similarly situated because of the different defenses available, including good cause, business necessity and waiver. The court rejected First Union's argument. The *Thiessen* decision ultimately ruled in favor of the case proceeding as a class.

In *Vaszlavik v. Storage Technology Corp.*, 175 F.R.D. 672 (Dist. Ct. CO 1997), the plaintiffs alleged that the defendant engaged in a "pattern and practice" of discrimination against its employees during a reduction in force from April 13th, 1993 through December 31st, 1996. The court held that even applying the higher "similarly situated" standard, certification is appropriate for the liability phase of the plaintiffs' pattern and practice claim. The liability phase will determine: 1) whether defendant engaged in a pattern and practice of discrimination against its employees in violation of the ADEA from April 13, 1993, to December 31, 1996; 2) if so, whether the defendant acted willfully and wantonly; and 3) whether plaintiffs are entitled to injunctive or declaratory, class wide relief.

It might be noted that in the complaint filed by the *Adams* Plaintiffs in this case, alleges a "pattern and practice" of discrimination. (See Sixth Amended Complaint, paragraph 26)

In *Wilkerson v. Martin Marietta Corp.*, 875 F.Supp. 1456 (Dist. Ct. CO 1995), the plaintiffs alleged that they had been victimized by a pattern and policy of age discrimination which motivated a series of layoffs (reduction in force). The court found that other courts have found this type of allegation alone sufficient for class certification. The court found that the allegation of discrimination by the plaintiffs transcends the differences existing among levels of management responsibility, as well as differences stemming from employment in different divisions or operating units of the defendant corporation. Citing *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3rd Circuit 1989). See also, *Heagney v. European American Bank*, 122 F.RD 125 (E.D. NY 1988) which held that former bank employees who were fired, laid off, or allegedly forced to resign could "opt-in" to an age discrimination class action, even though the class action had been filed on behalf of former employees who accepted the bank's early retirement program; employees may have left their jobs at different times via different procedural mechanism, but alleged unity of the bank's discriminatory scheme overwhelmed any differences.

The Defendants contend there is an absence of required administrative charge precluding piggybacking and certification. The Plaintiffs have previously mentioned the administrative charge of Janet E. Smith (Exhibit "W-4") and the administrative charge of William E. Hoover (Exhibit "W-1"). Both of these charges contain

language to sufficiently put the EEOC and the Defendants on notice and meets the requirements of *Grayson v. K-Ma*, 79 F.3rd 1086 (11th Circuit 1996). The *Grayson* court stated, that to serve as a basis for an ADEA class action, the underlying EEOC charge must contain allegations of class-wide discrimination. The court held that the underlying EEOC charge in *Grayson* adequately put the EEOC and the defendant on notice. The underlying charge stated "Within the last year, at least fifteen other store managers, all over the age of 40, have been demoted." Another underlying charge stated "Other older store managers have been demoted." Certainly if these underlying charges in *Grayson* met the test providing notice to the EEOC and the Defendant, then the charges filed in this case by Janet Smith and William Hoover, would meet the test. See, *Ingels v. Thiokol Corp.*, 42 F.3rd 616, 625 (6th Circuit 1994) where the court stated that in appropriate circumstances, however, most courts permit similarly situated individuals to join the action of a plaintiff even though the individual has not filed his or her own EEOC charge, so long as at least one plaintiff has complied with the filing requirement of §626(d). *Mistretta v. Sandia Corp.*, 639 F.2d 588, 593-94 (10th Circuit 1980). This is commonly referred to as the "single filing" rule. See also, *Hipp v. Liberty National Life Insurance Company*, 973 F.Supp. 1033 (M.D. Fla. 1997).

CONCLUSION

The plaintiffs have submitted in this response to the Defendant's Motion to Decertify substantial evidence of a single policy which discriminated against the Plaintiffs as

a class in violation of the ADEA. The Defendant's motion should be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a conformed copy of the foregoing has been furnished to NANCY F. REYNOLDS and J. LEWIS SAPP, ESQ., Elarbee, Thompson & Trapnell, 800 Peachtree-Cain Tower, 229 Peachtree Street, N.E., Atlanta, GA 30303; RODNEY GADDY, ESQ., P.O. Box 14042, St. Petersburg, FL 14042; GARY SASSO, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., One Progress Plaza, Barnett Tower, Suite 2300, 200 Central Avenue, St. Petersburg, FL 33701-4352; HOWARD J. SHIFKE, ESQ., First of American Plaza, 201 E. Kennedy Blvd. Suite 1520, Tampa FL 33602, and to JOHN GALLAGHER, 8011 Ainsdale, Lane, Chesterfield, VA 23832 on this 7th day of October, 1998.

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Case No. 99-90033-I

[United States District Court for the Middle District of Florida]
Case No. 95-123-CIV-OC-10A

WANDA L. ADAMS, *et al.*,

Plaintiffs/Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL

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IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

WANDA L. ADAMS, *et al.*, Plaintiffs/Petitioners, v. FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION, Defendants.	Case No. 99-90033-I

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, Defendants Florida Power Corporation and Florida Progress Corporation, through their undersigned counsel, certify that the following persons and entities have an interest in the outcome of this case:

Wanda Adams

James Akin

Awayland Coal Company, Inc.

Linda Baldwin

Willis Barnes

Elaine Barnes-Foster

Phillip Bassa

Larry Bayes

Patsy Baynard

James Beck

Cheryl Becker

Gary Becker

Cynthia Behrens-Boga

Earl Bettis

Richard Boreman

Boston Capital Corporate Tax Credit Fund VII

Boston Capital Corporate Tax Credit Fund VIII

Jerold Boyle

Linda Boyle

Gerald Brannen

Joseph Brannon

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Donald Broeckel

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Marjorie Copeland

Kenneth Corbett

Dixie Fuels Limited

Dixie Fuels II, Limited

Earl Doby

Samuel Dupuy

EFC Synfuel LLC

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Tom Engers

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Florida Power Corporation

Florida Power Corporation Energy Solutions, Inc.

Florida Progress Corporation

Florida Progress Funding Corporation

Leo Floyd

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Polly Gillespie

Ralph Graves

Linda Groseclose

Michael Harmeling

Thomas Hays

Eugene Hayward

Gopal Hegde

Honorable Wm. Terrell Hodges, Jr.

David Hodgson

Peter Holliday

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Roy Hooks

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Gerald Lamm II

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Little Black Mountain Coal Reserves, Inc.

Little Black Mountain Land Company

Thomas Livingston

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Richard Merriman

Mesa Hydrocarbons, Inc.

Mid-Continent Life Insurance Company

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James Owens

William (Bill) Passmore

Adolfo Paz

James Pennington

Mark Peterson

PIH, Inc.

Andre Poulard

Powell Mountain, Inc.

Progress Capital Holdings, Inc.

Progress-Centrus, Inc.

Progress Energy Corporation

Progress Holdings, Inc.

Progress Land Corporation

Progress Materials, Inc.

Progress Metal Reclamation Company

Progress Provisional Holdings, Inc.

Progress Rail Services Corporation

Progress Reinsurance Company, Ltd.

Progress Telecommunications Corporation

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Steve Twitty

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Dated: November 17, 1999

DEFENDANTS' OPPOSITION TO PLAINTIFFS' PETITION FOR PERMISSION TO APPEAL

This is an age discrimination lawsuit arising out of a series of layoffs and reorganizations at Florida Power Corporation between 1992 and 1996. By Order dated August 26, 1999, the District Court granted Defendants' Motion to Decertify the Plaintiffs' class.[1] In so ruling, the Court held that (1) the class should be decertified as to any disparate treatment age claim because the Plaintiffs' claims are "dissimilar because they worked in widely dispersed geographic areas and work units within the

[1] For the purposes of this Opposition, "Plaintiffs" will refer to "Petitioners" and vice versa.

Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria," August 26, 1999 Order on Pending Motions ("Order"), p. 4, and (2) the disparate impact theory does not apply in ADEA cases and, therefore, cannot provide the basis for a class claim in this case.

The District Court has now certified for interlocutory appeal the second part of this ruling, that is whether the Court properly decertified Plaintiffs' class on the ground that the disparate impact theory does not apply in ADEA cases. However, because Plaintiffs could not meet their burden under 29 U.S.C. § 216(b) of establishing that they are "similarly situated" even if the disparate impact theory were available, the issue as to the theory's availability in a disparate impact case is not a controlling legal issue that will materially advance the ultimate termination of this litigation and, therefore, is not a issue warranting interlocutory appeal. Specifically, the same facts and circumstances that led the District Court to conclude that class treatment of the disparate treatment claim was inappropriate dictate the conclusion that class treatment of a disparate impact claim is inappropriate in this case. Even if the disparate impact theory were available in age discrimination cases, Plaintiffs could not satisfy their burden of proving that they were "similarly situated." As the District Court held in ruling on the disparate treatment issue, there was no one common employment action or selection procedure that resulted in the termination of all

of the putative class members. The individual issues in the case would therefore still predominate over any perceived common issue. And the case would still not be manageable as a class action – particularly since the individual disparate treatment claims of the 55 named Plaintiffs must still be litigated. Indeed, because the individual disparate treatment claims of the 55 named Plaintiffs remain and must be litigated, and interlocutory appeal will not materially advance the ultimate termination of this litigation. Accordingly, interlocutory appeal in this case is not appropriate.

BACKGROUND AND PROCEDURAL HISTORY

A. Beginning in 1992, Florida Power Corporation underwent a number of different reductions in force and reorganizations

Florida Power Corporation is an electric utility whose service area encompasses approximately 20,000 square miles in 32 Florida counties. During the years in question, Florida Power staffed and maintained its General Office Complex; between 40 and 50 district or division offices, each in a different geographical location; a nuclear unit in Crystal River; 17 fossil steam plants at six different locations; and 44 peaking units at 11 different geographical sites. Scardino Dec. ¶ 4, Exhibit a to Defendants' Motion for Decertification, attached hereto as Exhibit 1.

There was no one reduction in force at Florida Power Corporation. Rather, between 1992 and 1996, the various divisions and locations and their respective decision-makers decided what changes, if any, were needed within

that unit or division and decided how to implement those changes. There was no common selection procedure that resulted in the terminations of the 55 named Plaintiffs and 61 putative opt-ins. Rather, the Plaintiffs "worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria." Order, p. 4. As David Miller, former Senior Vice President, Corporate Services, stated in his Declaration submitted in support of Defendants' Motion for Decertification, Exhibit C, attached hereto as Exhibit 2, "[w]hile various departments were individually deciding upon reorganizations, cutbacks, and the like, no standard method was utilized throughout FPC to determine which positions would be affected and/or eliminated or which employees would be separated." Miller dec. ¶ 15. And, as John Scardino, Vice President and Controller, stated, "[t]he reduction in personnel resulted from a number of different factors, including reorganizations; the elimination of processes, departments and operations; plant closings; and restructurings. Each department formulated and implemented its own selection process for determining who would be affected." Scardino Dec. ¶6.

B. Lawsuit filed more than four years ago

This lawsuit was filed on July 5, 1995, by fifteen former employees of Florida Power Corporation, who

alleged disparate treatment age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, and the Florida Civil Rights Act, Fla. Stat. § 760.01, *et seq.* The complaint included class allegations. Two additional Plaintiffs were added with the first amended complaint, filed on October 13, 1995.

Plaintiffs first alleged a disparate impact age claim in their Second Amended Complaint. Defendants opposed the addition of the disparate impact claim on two grounds: (1) that the disparate impact theory is not available in ADEA cases and (2) that not one of the Plaintiffs had included a disparate impact claim in his or her EEOC charge and, therefore, the administrative exhaustion conditions precedent to filing such a claim had not been satisfied. Without addressing either of these points, by Order dated March 12, 1996, the Court granted Plaintiffs leave to file the second amended complaint.

On July 31, 1996, Plaintiffs filed a motion for leave to file a Third Amended Complaint, to add 35 more named Plaintiffs. Before the District Court ruled on this motion, on August 12, 1996, Plaintiffs filed a Motion to File a Fourth Amended Complaint and then on September 27, 1996, they filed a motion for leave to file a Fifth Amended Complaint, to add a total of 39 additional Plaintiffs.

On December 11, 1996, by agreement of the parties, the Court conditionally certified a class. Following a class notice period, on August 27, 1997, Plaintiffs filed a Motion to File a Sixth Amended Complaint, to add, as named Plaintiffs, the 39 Plaintiffs identified in the proposed Fifth Amended Complaint plus the 61 individuals

who had submitted opt-in notices during the class notice period. On June 19, 1998, the District Court granted this motion as to the 39 Amendment Plaintiffs but denied it as to the 61 opt-ins, stating that the Court would consider the claims of the 61 opt-ins only as class members.

In the meantime, on June 6, 1997, the 39 Amendment Plaintiffs and 61 opt-ins filed a separate class action lawsuit against the same Defendants in the same Court, which was captioned *Akin v. Florida Power Corp., et al.*, Civil Action No. 97-173-Civ-OC. By Order dated June 19, 1998, the District Court put the *Akin* litigation in abatement. The stay of the *Akin* litigation remains in effect.

On August 7, 1998, Defendants filed their Motion to Decertify in this case. The District Court granted Defendants' motion by Order dated August 26, 1999. As noted above, the District Court concluded that the Plaintiffs are not similarly situated for purposes of a disparate treatment claim because the "individual characteristic of the claim of each Plaintiff predominates over any remaining common features of the claims." Order, p. 7. The District Court further concluded that the disparate impact theory is not available in ADEA cases and, therefore, it could not provide the basis for continued class certification.

On October 27, 1999, after receiving briefing from the parties on the propriety of an interlocutory appeal, the District Court certified for interlocutory appeal its August 26, 1999 Order decertifying the Plaintiffs' class based on the legal conclusion that the disparate impact theory does not apply in ADEA cases. Plaintiffs filed the

instant Petition for Permission to Appeal on November 8, 1999.[2]

ARGUMENT

I. INTERLOCUTORY APPEALS ARE RARELY PERMITTED AND ARE PROPER ONLY WHERE THERE IS A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THE IMMEDIATE APPELLATE RESOLUTION OF WHICH WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THE LITIGATION

Interlocutory appeals are rare and are only permitted in exceptional circumstances. *See, e.g., Armstrong v. Martin Marieta Corp.*, 138 F.3d 1374, 1387 (11th Cir.), *cert. denied*, 119 S. Ct. 545 (1998) ("[A]ppellate review of class certification decisions under § 1292(b) is and will be rare."); *Flor v. BOT Fin. Corp.*, 79 F.3d 281, 284 (2d Cir. 1996) (use

[2] The Petition for Permission to Appeal which Plaintiffs filed with the Court on November 8, 1999 differs from the Petition for Permission to Appeal which Plaintiffs served on Defendants. Specifically, the Petition for Appeal which Plaintiffs filed with the Court contains no Certificate of Service and every page of the Petition is numbered "1". The petition served on Defendants has a Certificate of Service dated November 11, 1999, although Defendants received it on November 9, 1999, and the pages of the Petition are numbered consecutively, with page 9 being the first page of the Petition. For the purposes of this Opposition, in order to facilitate citation to Plaintiffs' Petition, Defendants will consider the first page of the Petition page 1, the second page of the Petition page 2, and so on.

of 1292(b) "should be strictly limited because 'only exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' "); *Sussman v. Salem, Saxon & Nielson, P.A.*, 826 F. Supp. 1416, 1418 (M.D. Fla. 1993) (1292(b) "is designed to be used sparingly and only in exceptional cases."); *Farley v. Magnum*, No. 89-0725-CV-Hoeveler, 1995 U.S. Dist. LEXIS 20397, at *8 (S.D. Fla. June 9, 1995) (interlocutory appeals under 1292(b) require a showing of "exceptional circumstances" and should be "sparingly applied."), attached hereto as Exhibit 3.

Interlocutory appeals are particularly disfavored where reversal will not substantially alter the course of district court proceedings, the parties will not be relieved of any significant burden by reversal, or the appeal will only delay the ultimate resolution of the case. *See., e.g., Sussman*, 826 F. Supp. at 1418 (interlocutory appeal proper only where "speedy appeal would avoid protracted litigation."); *Global Access Ltd. v. AT&T Corp.*, 987 F. Supp. 1459, 1463 (S.D. Fla. 1997) (defendant "failed to overcome the strong presumption against interlocutory appeals as enunciated by the Eleventh Circuit Court of Appeals" where "given the already long history of the case, such additional time would unduly delay the trial"); *In re Slater Corp.*, No. 95-7118-Civ-Aronovitz, 1996 U.S. Dist. LEXIS 17185, at *7-8 (S.D. Fla. October 28, 1996) (where "immediate appeal will cause the parties to litigate the issue . . . in two different forums," appeal is improper), attached hereto as Exhibit 4.

Rather, under 28 U.S.C. § 1291(b), appeal of an interlocutory order is permitted only where the order "involves a controlling question of law as to which there

is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). *See Ray v. Edwards*, 725 F.2d 655 (11th Cir. 1984). The District Court's ruling that the Plaintiffs' class should be decertified because the disparate impact theory is unavailable in ADEA cases fails on each prong of this standard. Consequently, this Court should deny Plaintiffs' Petition for Permission to Appeal.

II. THE DISTRICT COURT'S AUGUST 26, 1999 RULING THAT THE DISPARATE IMPACT THEORY IS NOT APPLICABLE TO ADEA CLAIMS IS NOT A CONTROLLING QUESTION OF LAW AS TO WHICH THERE IS SUBSTANTIAL GROUND FOR DIFFERENCE OF OPINION AND THE IMMEDIATE APPEAL OF WHICH WILL MATERIALLY ADVANCE THE ULTIMATE TERMINATION OF THIS LITIGATION

In the context of this particular litigation, the District Court's ruling that the disparate impact theory is not available in ADEA cases does not satisfy the standards for interlocutory appeal. First, it is not a controlling question of law in this case. Even if ADEA disparate impact claims could be brought, certification of the putative class would still not be appropriate in this case because Plaintiffs could not satisfy the "similarly situated" standard required to obtain class certification in an ADEA action. As the District Court held, there was no common employment practice or selection procedure that resulted in the termination of all of the Plaintiffs and the putative optins; individual questions would still predominate over

perceived common questions; and, a class case would still not be manageable (since, for instance, the individual disparate treatment claims of the 55 named Plaintiffs would still have to be litigated along with any such disparate impact claim). Second, because the individual disparate treatment claims of the 55 named Plaintiffs in the *Adams* case will remain and have to be litigated regardless of whether the Court affirms or reverses the District Court's ruling, an interlocutory appeal will not advance the ultimate termination of this litigation in any way whatsoever; rather, it will simply delay it, causing undue prejudice to both parties.

A. The District Court's Ruling Is Not a Controlling Issue of Law in This Litigation Because Plaintiffs Could Not Satisfy the "Similarly Situated" Standard Even if the Disparate Impact Theory Were Available.

A question of law is not controlling "if the litigation would be conducted in the same way no matter how it were decided." Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, 16 Federal Practice and Procedure, Jurisdiction 2d § 3930, at 424 (1996). It follows that, if there is an alternate factual or legal basis upon which the court may reach the same result, there is no controlling issue warranting interlocutory appeal. *See, e.g., Ray v. Edwards*, 725 F.2d at 658 (where there is a "factual issue such that the district court would not need to rule on . . . the broader legal standard," interlocutory appeal as to what that standard should be is inappropriate); *Lerner v. Atlantic Richfield*, 690 F.2d 203, 211 (Temp. Emer. App. Ct. 1982) (rejection of one theory is not controlling

when another theory remains available that may support the same result) In this case, the issue of whether disparate impact claims are available in ADEA cases is not controlling of the District Court's decertification ruling because, for the same reasons that the District Court ruled that Plaintiffs cannot bring an ADEA collective action under a disparate treatment theory – because the Plaintiffs are not "similarly situated" – Plaintiffs cannot maintain an ADEA collective action under a disparate impact theory. *See Graves v. C&S Nat'l Bank of Georgia*, 491 F. Supp. 280, 282 (D.S.C. 1980) (where the legal issue sought for appeal was "not determinative of the present case," appeal under § 1292(b) was not proper).

Under 29 U.S.C. § 216(b), to obtain class certification in an ADEA action, the Plaintiffs must show that the proposed class members are "similarly situated." *See also Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170 (1989). In assessing whether class members are "similarly situated," courts typically focus on three factors – namely: "(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available [to defendants] which appear to be individual to each plaintiff; and (3) fairness and procedural considerations." *Brooks v. BellSouth Telecomms., Inc.*, 164 F.R.D. 561, 568 (N.D. Ala. 1995), *aff'd without op.*, 114 F.3d 1202 (11th Cir. 1997). Thus, courts routinely reject proposed collective actions where the "opt-in plaintiffs performed different jobs at different geographic locations and were subject to different job actions . . . which occurred at various times as a result of various decisions by different supervisors made on a decentralized employee-by-employee basis." *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 465 (D.N.J. 1988)

("*Lusardi II*"). *See also Brooks*, 164 F.R.D. at 569 (accord); *Ulvin v. Northwestern Nat'l Life Ins. Co.*, 141 F.R.D. 130, 131 (D. Minn. 1991) (accord). Courts have also routinely refused to permit collective actions where there are a "variety of particular, differing, and sometimes unique defenses available to [the defendant] in contesting the varied and disparate claims of the [proposed collective group]." *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1215 (5th Cir. 1995). *See also Brooks*, 164 F.R.D. at 569; *EEOC v. MCI Int'l., Inc.*, 829 F. Supp. 1438, 1446 (D.N.J. 1993); *Lusardi II*, 122 F.R.D. at 466. And, courts have recognized that "[t]he ADEA permits class actions only where employees are similarly situated in order that a defendant be afforded an opportunity to effectively defend. Requiring less would . . . amount to a deprivation of a property right in violation of the Due Process Clause . . . " *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 372 (D.N.J. 1987) ("*Lusardi I*").

Where a case cannot reasonably be managed as a collective action and will only result in jury confusion, certification would deprive the Defendants of Due Process and hence be inappropriate. *Thiessen v. General Electric Capital Corp.*, 13 F. Supp.2d 1131, 1143 (D. Kan. 1998); *Lusardi I*, 118 F.R.D. at 372. Indeed, even where there is evidence of a policy or pattern of discrimination, courts have decertified class actions where there are significant disparities in the factual circumstances involving each class member and numerous individualized defenses. *See, e.g., Lusardi I*, 118 F.R.D. at 376 n. 41 (statistical evidence supporting a claim of age discrimination does not address the similarly situated requirement where causation will still have to be shown as to each of the plaintiffs

and defendant will have available to it numerous individualized defenses).

The District Court itself recognized and applied these standards in holding that this case could not be certified with respect to a disparate treatment claim. The Court concluded that "the named Plaintiffs in this action are not 'similarly situated' in relation to the other members of the putative class." Order, p.6. Specifically, the Court recognized that the "individual features of each claim predominate over the common ones," Order, p. 6; that Defendants will necessarily present a myriad of individualized defenses; and that each claim will require an individualized inquiry, effectively rendering a collective action unmanageable. These same factors also preclude certification under a disparate impact theory.

1. No common selection procedure

First, Plaintiffs cannot establish that there was a common selection procedure that resulted in the terminations of all of the putative class members. Yet, to pursue a disparate impact class claim, Plaintiffs would need to be able to identify a specific employment practice that adversely affected *all* of the proposed class members. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989) ("a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack."). If different employment practices or selection procedures governed their respective layoffs, then Plaintiffs are not "similarly situated" and no class may be certified. *See e.g., Lusardi II*, 122 F.R.D. at 466; *Zachery v. Texaco Exploration & Prod., Inc.*, 185 F.R.D. 230, 238-239 (W.D. Texas 1999) (refusing to certify a class for a Title VII disparate impact claim of race discrimination in promotions because there was no common selection procedure for promotions).

As the District Court has already recognized, there was no common selection procedure that resulted in the terminations of the 55 named Plaintiffs and 61 opt-ins: rather, the Plaintiffs "worked in widely dispersed geographic areas and work units within the Defendants' business and industrial operations; they held a wide variety of job classifications; were managed and supervised by different people; and were terminated at different times by different decision makers based on different considerations or criteria." Order, p. 4. The same record evidence upon which the Court relied to decertify the proposed disparate treatment class – the evidence of different actions being taken by different people, at different times, in different departments, different reasons, and using different selection procedures, *see* pp. 3-4 *supra*, – dictate the decertification of a proposed disparate impact class in this case, even if disparate impact claims were available under the ADEA.[3]

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[3] Defendants are not arguing at this time, as the District Court suggested they were, that none of the Plaintiffs could ever prove an individual disparate impact case. Rather, Defendants submit that Plaintiffs cannot establish that they are "similarly situated" for purposes of a wide-class disparate impact claim and that, therefore, the legal issue of whether disparate impact claims are available under ADEA cases is not controlling on whether the District Court properly decertified the Plaintiffs' class.

2. Individualized issues and defenses predominate.

Second, as the District Court also already implicitly recognized, Plaintiffs' claims are subject to a multitude of individualized defenses – even if they are allowed to proceed on a disparate impact theory. For instance, for each of the 55 named Plaintiffs' disparate treatment claims, Defendants will present evidence of distinct legitimate, nondiscriminatory reasons for the employment actions. Thus, regardless of whether disparate impact is a viable theory under the ADEA, because the disparate treatment claims remain, individual issues predominate over any perceived common ones.

In addition, as to both treatment and impact claims, Defendants would still be entitled to present individualized defenses such as the lack of causation, the failure to file an administrative charge, and the statute of limitations. For instance, Defendants would still be entitled to show that the identified specific practice did not cause the termination of individual Plaintiffs – that is that there were other causes. *See, e.g., Edwards v. Wallace Community College*, 49 F.3d 1517, 1520 (11th Cir. 1995) (affirming summary judgment on disparate impact claim in race discrimination case where plaintiff failed to identify an employment practice that "led to a discriminatory impact on African-Americans and, more specifically, that affected her.").

Here, the record is replete with evidence that demonstrates the individualized nature of the decision-making process. *See* pp. 3-4, *supra*, And, of course, as the District Court noted in its August 26, 1999 Order, p. 4, if any of

the Plaintiffs were to prevail, the case of "each will vary according to the selection of an individual remedy – the calculation of damages, including resolution of issues of mitigation, or the appropriateness of equitable relief including the possibility of reinstatement." *See, e.g., Zapata v. IBP, Inc.*, 167 F.R.D. 147, 166 (D. Kan. 1996) (denying plaintiffs' motion to certify class where "[p]laintiffs' claims are highly individualistic, inasmuch as the precise relief which this court would grant to each successful plaintiff depends upon a number of factors and characteristics specific to each particular plaintiff" such that "individual damages determinations predominate over common issues."). In sum, because of the myriad of individualized facts and defenses, a class action would not be appropriate in this case even with a disparate impact claim.

3. Existence of individual disparate treatment claims, as well as individualized defenses to any disparate impact claim, renders case unmanageable as a collective action

Finally, this case is not manageable as a class action, even if the disparate impact theory were available. Accordingly, Plaintiffs cannot satisfy the "similarly situated" standard of 29 U.S.C. § 216(b). Under § 216(b), Plaintiffs must show that the case can be manageably and fairly tried as a class action. *See Mooney v. Aramco*, 54 F.3d at 1215-1216 (affirming district court's conclusion that fairness and procedural consideration dictated decertification); *Thiessen v. General Electric Capital Corp.*, 13 F. Supp.2d at 1143 (plaintiffs' proposed trial management plan reinforced the court's decision to decertify where, in

the end, the only viable and appropriate solution would be single-plaintiff trials, thereby defeating one of the benefits of proceeding as a collective action); *Bayles v. American Med. Response of Colorado*, 950 F. Supp. 1053, 1067 (D. Colo. 1996) (decertifying collective action in FLSA context, court stated "given the number of individual issues that must be resolved, I am not persuaded that a single trial would save significant time or effort.").

To proceed with a collective action with the individualized defenses and circumstances surrounding the claims of each of the 55 named Plaintiffs and the 61 optins, plus the defenses and circumstances surrounding the individual disparate treatment claims of each of the 55 named Plaintiffs, would defeat the purposes of a collective action – namely, the efficient resolution of common issues. Rather, here, a collective action would lead to extraordinary jury confusion and would deny Defendants the opportunity to effectively defend; and, because of the overlap in issues of fact between Plaintiffs' disparate treatment age claims and any disparate impact age claim, separate proceedings on these claims would run afoul of the Seventh Amendment. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 422-425 (5th Cir. 1998) (Seventh Amendment concerns precluded partial certification of race discrimination action on disparate impact claim). In sum, the widely disparate nature of the putative class and the highly individualized nature of the defenses would make this case entirely unmanageable as a collective action and warrants decertification.

In short, even if the disparate impact theory were available in ADEA cases, the District Court would, in any event, be required to decertify the putative class because

its supposed members are not "similarly situated" within the meaning of 29 U.S.C. § 216(b). Therefore, the legal issue of whether the disparate impact theory is available in ADEA cases is not a controlling issue of law that is properly subject to immediate interlocutory appeal.[4]

B. An Immediate Appeal from the District Court's Ruling Will Not Materially Advance the Ultimate Termination of this Litigation

Since an interlocutory appeal will not materially advance the ultimate resolution of the litigation, it is unwarranted. Under the governing case law, if the parties

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[4] Moreover, because Plaintiffs have failed to meet the basic administrative prerequisites necessary to maintaining such a claim – namely filing an EEOC charge giving notice of the claim, an ADEA disparate impact claim would, in any event, fail. Accordingly, again, the legal issue of whether the disparate impact theory is available in ADEA cases, is not a controlling one in this case. Specifically, none of the Plaintiffs ever filed an EEOC charge giving notice of a disparate impact claim. The relatively few charges that were filed all raised claims of individual disparate treatment. Plaintiffs effectively conceded this fact when they argued in Plaintiffs' Response to the Court Order Entered February 5, 1996, Regarding Disparate Impact Claims in Filing with the EEOC, pp. 5-6, that some of the affidavits the Plaintiffs submitted to the EEOC provided notice of such claims. However, affidavits submitted to the EEOC are confidential while an investigation is pending and are not provided to the employer. They, therefore, cannot be cited as providing notice to an employer of a particular claim. *See, e.g., Kloos v. Carter-Day Co.*, 799 F.2d 397, 401 (8th Cir. 1986) (counsel's letter to EEOC did not constitute adequate notice of class since the EEOC did not transmit the letter to the employer.).

will be the same and many of the same issues will have to be litigated regardless of the disposition of the certified questions, certification is not appropriate. *See, e.g., Westwood Pharms., Inc. v. National Fuel Distrib. Corp.*, 964 F.2d 85, 88 (2d Cir. 1992) (even if one defense did not apply, where many of the same factual issues relevant to the defenses would still have to be litigated, interlocutory appeal is generally improper); *In re Slater Corp.*, No. 95-7118-Civ-Aronovitz, 1996 U.S. Dist. LEXIS 17185, at *7-8 (S.D. Fla. October 28, 1996) (where lower court would still be required to determine broader issue, interlocutory appeal on narrower issue would not advance ultimate termination of litigation); *Iowa State Univ. Research Found., Inc. v. Murata Machinery Ltd.*, 1993 U.S. App. LEXIS 14273, at *6 (Fed. Cir. March 22, 1993) (declining to accept appeal under 1292(b) because "whether or not we accept this appeal, the litigation between [the parties] will continue."), attached hereto as Exhibit 5; *Graves v. C&S National Bank of Georgia*, 491 F. Supp. 280, 282 (D.S.C. 1980) (interlocutory appeal not permitted where the disputed legal issue "does not end the litigation or otherwise determine the rights of the parties as a trial would still be required at some later date" and "an immediate appeal would result in postponing this trial and increase the time and costs of litigation."); *Arnold v. United Artists Theatre Circuit Inc.*, 158 F.R.D. 439, 466 (N.D. Cal. 1994) ("In view of the approximately two years of delay that would result from a § 1922(b) certification, it is clear that certification of an interlocutory appeal would slow rather than accelerate the ultimate termination of the litigation.").

In this case, for many of the same reasons already discussed, an interlocutory appeal will not materially advance the ultimate termination of the litigation. Many issues will remain to be litigated in any event. There are 55 named Plaintiffs remaining in this case, *i.e.*, the 17 original named Plaintiffs and the 38 amendment Plaintiffs. Their individual disparate treatment claims will remain regardless of the outcome of any appeal on the disparate impact class certification issue (that affects only the 61 opt-ins). An interlocutory appeal will not advance the litigation of these claims at all; rather it will delay their resolution, causing prejudice to both Defendants and Plaintiffs.

Moreover, as noted above, there are numerous factual and legal defenses to any disparate impact claim. For instance, as to each Plaintiff, there would be issues as to the basis for the individual termination decision: who made the decision, how the decision was made, and why the decision was made. Thus, again, an appeal will not advance the ultimate termination of the litigation.

Finally, this case has been pending for over four years. As both Plaintiffs and Defendants have realized while attempting to conduct discovery over the last year, Plaintiffs and witnesses are changing jobs and moving to other states and memories are continuing to fade, making it increasingly difficult for parties to schedule depositions and obtain meaningful discovery. Any further delay will simply make these problems more acute. For these reasons, this case does not satisfy the §1292(b) standard for interlocutory appeal.

CONCLUSION

For the foregoing reasons, the District Court's ruling that the Plaintiffs' class should be decertified because the disparate impact theory is unavailable in ADEA cases is not a controlling question of law as to which there is substantial ground for difference of opinion and the immediate appellate resolution of which will materially advance the ultimate termination of this litigation. Accordingly, Defendants respectfully request that this Court deny Plaintiffs' Petition for Permission to Appeal.

Respectfully submitted,

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Dated: November 17, 1999

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[Certificate of Service Omitted In Printing]

EXHIBIT 1

[Declaration of John Scardino, Jr. Reprinted *supra*, at pages 31 to 32.]

EXHIBIT 2

[Declaration Of David L. Miller Reprinted *supra*, at pages 53 to 62.]

EXHIBIT 3

[*Farley v. Magnum Marine Corp.*, U.S. District Court, Southern District of Florida, No. 89-0725-CV-Hoeveker, June 9, 1995, Omitted In Printing.]

EXHIBIT 4

[*In re*: *Slater Corp.*, U.S. District Court, Southern District of Florida, No. 95-7118-CIV-ARONOVITZ, October 28, 1996, Omitted In Printing.]

EXHIBIT 5

[*Iowa State Univ. Research Found. v. Murata Machinery*, U.S. Court of Appeals, Federal Circuit, No. 365, March 22, 1993, Omitted In Printing.]

THE OLDER AMERICAN WORKER

AGE DISCRIMINATION IN EMPLOYMENT

REPORT OF THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964

JUNE 1965

LETTER OF TRANSMITTAL

WASHINGTON, D.C., *June 30, 1965.*

Hon. JOHN W. MCCORMACK,
Speaker of the House of Representatives.

Hon. HUBERT H. HUMPHREY,
The President of the Senate.

SIRS:

I have the honor to transmit to the Congress herewith the "study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination," with my recommendations on this subject, as required to be submitted by June 30, 1965, under Section 715 of the Civil Rights Act of 1964 (Public Law 88-352).

This report is based upon special studies conducted in response to this directive of the Congress and upon extensive research done earlier, including the work of the President's Council on Aging. The special studies conducted for this report are contained in a separate volume of research materials.

The report presents recommendations for dealing with arbitrary discrimination in employment because of

age and with the basic factors which impede the reemployment of displaced workers as they grow older. It also discusses measures which should be considered for the fuller use of the talents and time of older persons in private enterprise and in community service.

It is my sincere hope that the report will provide the impetus for effective measures in this most deserving and much neglected cause.

Sincerely,

/s/ W. Willard Wirtz
W. WILLARD WIRTZ,
Secretary of Labor

CONTENTS

		Page
I.	INTRODUCTION	—
II.	FINDINGS	—
	Factors Which Might Tend to Result in Discrimination in employment Because of Age	—
	A. Discrimination Arising from Dislike or Intolerance	5
	B. Arbitrary Discrimination: Specific Age Limits	8
	C. The Necessary Recognition of Forces of Circumstances	11
	D. Institutional Arrangements that Indirectly Restrict the Employment of Older Workers	15

	The Consequences of Such Discrimination on the Economy and Individuals Affected	18
	A. The Consequences to the Economy	18
	B. The Consequences to the individual	18
III.	CONCLUSIONS AND RECOMMENDATIONS	21
	Action to Eliminate Arbitrary Age Discrimination in Employment	21
	Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers	22
	Action to Increase the Availability of Work for Older Workers	23
	Action to Enlarge Educational Concepts and Institutions to Meet the Needs and Opportunities of Older Age	25
	RESEARCH MATERIALS – UNDER SEPARATE COVER	

I. Introduction

The poet Browning could write of growing old, and say of it: "The best is yet to be / The last of life, for which the first was made."

A century later, reality has still not caught up with that poetry. Although scientists and doctors have extended life with almost incredible ingenuity, and have eased some of the physical pains of old age, there has been no comparable invention regarding the uses of these long years of vigorous active life that now commence at the point where, until almost this generation, life began

rapidly to ebb. Yet, this is in truth a miracle, a new age of man; and it is hardly to be wondered that it has brought with it new problems as yet unsolved, indeed as yet hardly examined.

The Social Security Act of 1935 established an historic precedent; but security is no more than a foundation for satisfaction, and not itself enough. Subsequent legislation – various housing acts, parts of the antipoverty program, provisions to cover some of the costs of illness that comes with age – has recognized the right to grow old in decency. Yet decency, too, is meager reward.

Meeting the problems associated with advancing years remains, accordingly, a pressing piece of unfinished business for those who consider it not heresy, but the fullest reverence, to include the perfectibility of life within the human competence.

There is, in this connection, no harsher verdict in most man's lives than someone else's judgment that they are no longer worth their keep. It is then, when the answer at the hiring gate is "You're too old," that a man turns away, in another poet's phrase, finding "nothing to look backward to with pride, nothing to look forward to with hope." If that verdict is fair on the facts, it can only be viewed as part of life's bruising mystery. But if that verdict is unfair, or unnecessary, it is part of man's inhumanity to man that can be and must be stopped.

All of this is the context of the Congress' provision, in Section 715 of the Civil Rights Act of 1964, that –

> The Secretary of Labor shall make a full and complete study of the factors which might tend to result in discrimination in employment

> because of age and of the consequences of such discrimination on the economy and individuals affected. The Secretary of Labor shall make a report to the Congress not later than June 30, 1965, containing the results of such study and shall include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable.

This report is presented in response to this requirement.

The Congressional directive was carefully and precisely worded, avoiding prejudgment of the influence of discrimination on the employment of older workers, recognizing subtly that not all discrimination in this area is "arbitrary," asking a broad consideration of all "factors which might tend to result in discrimination" in employment because of age, and requesting a report on the consequences of these factors both on the economy and on the individuals affected. These guides have shaped this report.

The development of responsible and effective public policy regarding discrimination based on age requires as steadfast and unfearing confrontation of reality as did the development of a national policy opposed to discrimination based on race, color, religion, sex, or national origin. But there is an essential difference.

The Nation has faced the fact – rejecting inherited prejudice or contrary conviction – that people's ability and usefulness is unrelated to the facts of their race, or color, or religion, or sex, or the geography of their birth. Having accepted this truth, the easy thing to do would be

simply to extend the conclusions derived from it to the problem of discrimination in employment based on aging, and be done with the matter. This would be easy – and wrong.

The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving – for example – race. It means in connection with the age question, furthermore, several different things.

Employment discrimination because of race is identified, in the general understanding of it, with non-employment resulting from feelings about people entirely unrelated to their ability to do the job. There is *no* significant discrimination of this kind so far as older workers are concerned.

The most closely related kind of discrimination in the non-employment of older workers involves their rejection because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions*. It is this which Congress refers to, in Section 715 of the Civil Rights Act, as "arbitrary discrimination."

A third type of discrimination – which should perhaps be called something else entirely – involves decisions not to employ a person for a particular job because of his age *when there is in fact a relationship between his age and his ability to perform the job*. The only reason for marking out this third area is that it clearly does exist so far as the age question is concerned, but does not exist so far as, for example, racial or religious discrimination are concerned.

There is finally, so far as age is concerned, that kind of "discrimiantion" which results when an employer turns an older man or woman away, not because of concern about the individual's ability to perform the work, but because of programs and practices actually designed to *protect* the employment of older workers while they remain in the work force, and to provide support when they leave it or are ill. Seniority and promotion-from-within systems, and pension and insurance programs, are a mark of civilization. They vastly enhance the dignity, the security, the quality of the later years of life in the United States. At the same time, ironically, they sometimes have tended to push still further down the age at which employers begin asking whether or not a prospective employee is too old to be taken on.

With these distinctions between various kinds of "discrimination" in mind, it is important, next, to recognize that there are *two* sets of value judgments to be made regarding any particular kind of discrimination based on age.

The most obvious of these judgments must be made in terms of the justification for particular employment practices in relationship to the efficient operation of a particular enterprise and of the economic system as a whole. This includes the value to the system of making maximum use of the Nation's full manpower potential, of each individual's full capacity.

What is less obvious, indeed still unclear, is the extent to which account is properly taken of the value *to the individual* of opportunity which the most "efficient" operation of the system as a whole might not provide.

The prevailing assumption is that people are created for jobs, not jobs for people. The difference between a great and a lesser society – particularly one which prides itself on being individual-oriented rather than system-oriented – includes its readiness to review this traditional assumption. The point is clearest in the case of an older person whose economic value becomes marginal in traditional market place terms, but for whom employment is the difference between life's having meaning and no meaning. This is not just a matter of "human" concern for the individual. There may well be involved a choice for the rest of us between paying, as customers, a few cents an hour of that individual's wages (and getting the value of his productive potential) or, in the alternative, paying, as taxpayers, the full amount of his "welfare" upkeep (and getting nothing in return).

It is proper reminder, as part of a preface to policymaking regarding a question involving age, that while each of us is growing older as an individual we are growing younger (at least for the present) as a whole population.

It is true, on the one hand, that the absolute number of older persons – and therefore the number of persons who may be the victims of age discrimination in employment – is growing rapidly.

- ★ There are today 22 million men and women between the ages of 45 and 55, almost 17 million between the ages of 55 and 65, and 18 million 65 and over.
- ★ These numbers are all significantly greater, both in absolute terms and as a proportion of the

entire adult population, than was true ten years ago, or twenty, or fifty.

- ★ By 1975, there will be almost 94 million men and women between 45 and 55, about 20 million between 55 and 65, and about 21 million 65 and over.

Because young persons go to work later than they used to, and more and more older women are going back to work, the number of workers age 45 and over continues to grow; and older workers will still make up more than a third of the work force in the years ahead.

So the problem area is increasing significantly.

At the same time, however, the median age of the population in the United States is going down.

- ★ Half of us are today under 29.
- ★ By 1975, half of us will be under 26.

What this means is that a Nation which already worships the whole idea of youth must approach any problem involving older people with conscious realization of the special obligation a majority assumes with respect to "minority group" interests. This is, to be sure, one minority group in which we all seek, sometimes desperately, eventual membership. Discrimination against older workers remains, nevertheless, a problem which must be met by a majority who are not themselves adversely affected by it and may even be its temporary beneficiaries.

The "discrimination" older workers have most to fear, however, is not from any employer malice, or unthinking majority, but from the ruthless play of wholly

impersonal forces – most of them part of what is properly, if sometimes too casually, called "progress."

Over a sixth of the railroad engineers in the United States are 65 or older. But airline transport pilots must retire at 60. Astronauts are not hired after 35.

The same advancing science that is extending people's productive lives is contributing to putting lower age limits on employment.

This results partly, at least for the present, from the increase in educational requirements for many jobs, and from the fact that older workers today have less formal education, on the whole, than younger workers. Among male workers 45 to 54, nearly one-third of those who are white, and almost two-thirds of the nonwhite group, *have not gone beyond the eighth grade*. Among male workers 55 to 64, nearly half of the white group and more than three-quarters of the nonwhite group *have not gone beyond the eighth grade*. This is in sharp contrast to the education of young persons now entering the work force.

Any formal employment standard which requires, for example, a high school diploma will obviously work against the employment of many older workers – unfairly if, despite his limited schooling, an older worker's years of experience have given him the relevant equivalent of a high school education.

In 1964, about 3½ million workers 45 years old or older were involuntarily unemployed at one time or another. As the number of older workers increases, the problem of their job readjustment and unemployment

will be compounded. The achievement of fuller employment opportunity in the economy as a whole will provide more jobs for older workers. At the same time, the pace of changing technology, changing jobs, changing educational requirements, and changing personnel practices increases the need for special efforts if older workers' employment prospects are to improve significantly.

The Findings which follow in this report identify the extent to which there is evidence of age "discrimination" of various kind, particularly "arbitrary" discrimination, as a factor in the unemployment of older workers.

The Conclusions and Recommendations suggest measures which can and should be taken to increase the economic and social well-being of the Nation and the satisfactions of life for millions of older American workers who will otherwise be the victims of discrimination in employment based on age.

II. Findings

These findings cover the two areas specified in section 715 of the Civil Rights Act of 1964:

> *Factors which might tend to result in discrimination in employment because of age.*
>
> *The consequences of such discrimination on the economy and individuals affected.*

In each case, the findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not. Yet some of these other factors not only

have the same effect as arbitrary discrimination, but are equally susceptible to constructive action.

Factors Which Might Tend to Result in Discrimination in Employment Because of Age

Older workers are in general valued and often prized employees. Almost 97 percent of male workers 45 and over were employed in 1964. Persons over 45 make up almost 40 percent of the U.S. labor force, but only 27 percent of total unemployment, and only 17 percent of all the applicants registered at the public employment service offices. Most older workers who are not at retirement age do get reemployed when they lose jobs.

There is, nevertheless, clear evidence of the Nation's waste today of a wealth of human resources that could be contributed by hundreds of thousands of older workers, and of the needless denial to these workers of opportunity for that useful activity which constitutes much of life's meaning.

The central element identifiable in this situation is the fact of sluggish human adjustment and impersonal economic accommodation to the present rapid pace of scientific and technological progress.

These findings analyze the extent to which older workers are deprived of useful and profitable activity as a result of each of the four types of discrimination described in the Introduction to this report.

As has already been indicated in the Introduction, we find no significant evidence of the first kind of discrimination – that which is based on the kind of dislike or

intolerance that sometimes exists in the case of race, color, religion, or national origin, and which is based on considerations entirely unrelated to ability to perform a job.

We do find substantial evidence of arbitrary practice in the second category of discrimination – discrimination based on unsupported general assumptions about the effect of age on ability – in hiring practices that take the form of specific age limits applied to older workers as a group.

We find that in the third category, which involves decisions made about aging and the ability to perform in individual cases, there may or may not be arbitrary discrimination on the basis of age, depending on the individual circumstances.

Individual circumstances may similarly lead to arbitrary discrimination in the fourth category that involving institutional arrangements which operate indirectly to restrict the employment of older workers.

A. Discrimination Arising from Dislike or Intolerance

Discrimination in employment based on race, religion, color, or national origin is accompanied by and often has its origins in prejudices that originate outside the sphere of employment. There are no such prejudices in American life which apply to older persons and which would carry over so strongly into the sphere of employment.

The process of aging is inescapable, affecting everyone who lives long enough. It is gradual, minimizing and

obscuring differences among people. At all times there are people of all ages living in close association rather than in separate and distinct social or economic environments. The element of intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers.

It is true that hiring officials are not immune to the brightness, vigor, and attraction of youth, nor always above exploiting these attributes for commercial advantage. But such choices involve preferences *for* one group, rather than antagonism *against* another.

We have found no evidence of prejudice based on dislike or intolerance of the older worker. The issue of discrimination revolves around the nature of the work and its rewards, in relation to the ability or presumed ability of people at various ages, rather than around the people as such. This issue thus differs greatly from the primary one involved in discrimination on the basis of race, color, religion, or national origin, which is basically unrelated to ability to perform work.

This is not to say that there is no intolerant prejudice against older persons as such. Determinations not to employ older workers can become deep-seated and even emotional in character. But were this the sole matter, the degree to which it exists would not warrant public concern.

B. Arbitrary Discrimination: Specific Age Limits

The most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications. These restrictive practices appear in announced employer policies (e.g., in Help Wanted advertisements; or in job orders filed with employment agencies) or in dealings with applicants when they appear in the hiring office.

It has become generally realized that these broad age-limit practices have developed to a point requiring public attention. Twenty States have passed statutory prohibitions of one form or another against them. But there has been no comprehensive study of their scope or effects, and the available information has been largely limited to two surveys (in 1956 and in 1963) of age restrictions placed by employers on job openings filed with local Employment Service offices.

A special study of age limitations in hiring has accordingly been made in connection with the preparation of this report. This study is based on a survey made by the Bureau of Employment Security of the Department of Labor, through the Federal-State Employment Service system. The study covers a sample of over 500 employers, employing half a million workers, in five cities (Baltimore, Indianapolis, Kansas City, Mo., Memphis, and Salt Lake City). These cities are all in States which did not, as of the time of the study (early 1965) have laws against age discrimination in employment. (Indiana has since adopted such a law.) The study includes both

employers who file job openings with the Employment Service and others who do not.

The fall study is contained in the volume of research materials which accompanies this report.

This 1965 study, along with other available data and information, permits the following findings.

1. *The setting of specific age limits beyond which an employer will not consider a worker for a vacant job, regardless of ability, has become a characteristic practice in those States which do not prohibit such action, to the extent and with the result that in these States:*

- *Over half of all employers are presently applying such limitations, using age limits typically set at from 45 to 55;*
- *Approximately half of all job openings which develop in the private economy each year are closed to applicants over 55 years of age, and a quarter of them are closed to applicants over 45.*

Almost three out of every five employers covered by the 1965 survey have in effect age limitations (most frequently between 45 and 55) on new hires which they apply without consideration of an applicant's other qualifications. Twenty-seven percent of the employers reported formal upper age specifications for some or all occupations. It was determined on investigation that an additional 30 percent follow such a policy in practice.

The results of this survey are consistent with those in the 1963 Employment Service survey of the job orders filed by employers with the Service in eight cities (Albuquerque, Baltimore, Houston, Indianapolis, Kansas City

(Mo.), Louisville, Memphis, Salt Lake City) in States having no laws prohibiting age discrimination. The 1963 survey revealed that about 30 percent of the job orders filed were limited to men and women under 45, and over 40 percent were limited to applicants under 55. A similar study in 1956 in seven other cities had shown even higher percentages of job orders with age restrictions: 40 percent fixed age 45 as an upper limit, and over 50 percent fixed age 55 as the limit.

2. *The establishing by employers of stated age limitations (or, on the other hand, of stated policies against any age limitations) has a direct and marked effect upon the actual employment of older workers, with the result that:*

- *The proportion of older workers hired by firms with stated upper age limits is half the proportion of older workers hired by firms with stated policies of ruling out age limits.*
- *The proportion of older workers hired by firms with no stated policy regarding age limitations is significantly smaller than the proportion of older workers hired by firms with stated policies of ruling out age limits, especially with respect to workers 55 and over.*

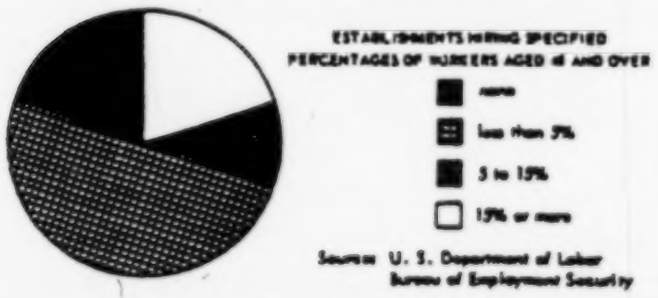
The 1965 survey shows the following:

Age of older hires	*Older hires as percent of total hires in firms having –*		
	Upper age limits	*No policy on age*	*No age limits*
Total, 45 years and over.	6.9	8.6	13.0

45 to 54 years...	4.7	6.5	9.5
55 to 64 years...	1.9	1.8	3.3
65 years and over	.3	.3	.2

A very small proportion of new employees hired today are 45 or older. One-fifth of the employers surveyed hired no older workers at all. (See chart 1.) These facts in themselves indicate, of course, nothing about discrimination.

Chart 1. OLDER WORKERS REPRESENT LESS THAN 5 PERCENT OF NEW HIRES IN MOST ESTABLISHMENTS[1]



[1] Based on Special Survey of Hiring Practices in 5 Cities in 1965

The state of labor supply and demand obviously has an important influence on employer hiring policies. Restrictions tend to be eliminated, eased, or waived when the employer cannot recruit under rigid specifications. The 1965 survey, like earlier surveys, shows somewhat fewer restrictions (i) in skilled occupations, the traditional crafts, and the professional and semiprofessional positions, where there are widespread shortages, and (ii) in the expanding but traditionally lower paid retail sales

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and service occupations. Age limitations are most frequent for clerical positions and for semiskilled and unskilled work, and for "outside" salesmen. Similarly, the manufacturing industries, with the notable exception of apparel, are hiring relatively few people over 45. Retail stores, hotels, personal and medical service industries, and government agencies are generally hiring older workers in substantially larger proportions.

It is reasonable to expect that present age restrictions would be eased to some extent under conditions of fuller employment. This has happened in the past, particularly in periods of national emergency. There is no current indication, however, of any general or significant relaxation of present age restrictions in hiring on the basis of prospective overall economic developments alone.

The prospect is, rather, that the continuation of age limitations will have a substantial adverse effect upon the employment opportunities of older workers.

3. *An unmeasured but significant proportion of the age limitations presently in effect are arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.*

Conclusive determination of the extent to which age restrictions are arbitrary would necessitate detailed examination of the reasons for the limitations in individual cases, under carefully established procedures including, almost necessarily, some form of hearing process. No such proceedings were envisaged in Section 715 of the Civil Rights Act, and none have been instituted.

It is apparent, however, from evidence obtained during the course of this study, that a great many age limitation policies are based in fact on considerations quite different from those offered as (and undoubtedly believed to be in many cases) their explanation.

The explanations given by employers for the adoption of age limitations include (as reflected in the 1965 study) a variety of factors:

- Physical capability.
- A policy of promotion-from-within and accompanying restriction of hiring to younger ages and entry jobs.
- Ability to hire younger workers for less money, and concern that older workers' earnings expectations are "too high."
- Pension plans (costs and provisions), and to a much lesser extent, costs of health and life insurance.
- Lack of skills, experience, or educational requirements.
- Limited work expectancy.
- Training costs and low productivity.
- Lack of adaptability and undesirable personal characteristics.
- Desired age balance in the work force.

Physical capability is by far the most prominent single reason advanced for imposing upper age limits.

There are unquestionably *some* jobs involving physical demands so unusual that it represents not only good

business sense but common decency not to assign them to workers whose age increases the *possibility* of some weakening of body tissue.

It is relevant, however, in determining the true basis for these age limitations which are explained in terms of physical demands of the work

- That in 70 percent of the cases of claimed basing of age limits on physical capabilities reported in the 1965 survey, no studied basis for this conclusion was reported;
- That there is a vast difference between various employers' ideas concerning the age at which physical demands should exclude workers from jobs involving similar duties – so that in the 1965 survey physical requirements were reported to account for restrictions as low as 25 years of age and as high as 60 for groups of occupations involving comparable physical exertions and demands for strength;
- That a great many responsible employers do hire older workers for jobs other employers bar them from on the basis that their age alone disproves their capability.

The very generality of many of the age limitations indicates their character. They exclude *all* potential new employees above a certain age, without any differentiation among the various jobs which may be involved and with no provision for determination of whether particular applicants might be qualified despite their age.

Further illumination comes from the responses which employees using age limitations made to an inquiry

included in the 1965 Employment Service survey concerning the circumstances under which these restrictions might be waived. Labor supply conditions outweigh any other considerations. Many employers using age restrictions indicate a willingness to hire "over-age" workers if they cannot get younger workers, but will not consider them on their merits if the jobs can be filed with younger workers. Some state that older workers would only be hired if their abilities *exceeded* those of younger workers.

The various studies show that upper age limits set on a company wide basis are generally lower than those set for specific jobs. The higher the skill level, and the greater the demand for workers, the higher the age limit; age limits for professional, managerial, and skilled workers are typically set at 50 or higher; for service workers also at 50 or above; for clerical workers and salesmen below 50; and for semiskilled and unskilled below 45. A clear reflection of job market judgment is apparent in the setting of these ages.

4. *The competence and work performance of older workers are, by any general measures, at least equal to those of younger workers.*

The Bureau of Business Management at the University of Illinois in a study of supervisory ratings in manufacturing establishments in 1954 found that 11 percent of the workers 60 years old and over received excellent ratings for overall performance; only 3 percent received poor ratings. On work quality, 32 percent were rated better than young workers, 60 percent the same and 8 percent poorer.

A 1959 Canadian study of sales persons in retailing showed that workers hired above the age of 40 attained higher performance ratings in a shorter period than workers hired below 30 years of age. They reached their peak performance in their fifties.

Department of Labor studies of factory production work involving physical effort indicate that a slight decrease in productivity occurs after age 45; but that the decrease does not become substantial until age 60. In office or other sedentary work little, if any, decline occurs prior to age 60, and the subsequent decline is minor.

So far as the allegedly key issue of physical capability is concerned, a comprehensive review of available medical and psychological evidences reveals no support for the broad age lines which have been drawn on the basis of claimed physical requirements. To the contrary. The basic research in the field of aging has established that there is a wide range of individual physical ability regardless of age.

The most extensive series of recent studies are those reported by A. T. Welford in 1958 on the basis of the Nuffield Foundation's basic work on aging and human skill, covering the post war period. These studies attribute most of the deterioration of ability to changes in the central nervous system, and indicate that these changes do not affect occupational skills in any significant numbers of cases before age 60.

The Nuffield Foundation studies do point to increasing differences of individual performance with advance in age. They show, however, at the same time, an increasing capacity of the human system to compensate for

diminishing abilities, and a wide range of occupational requirements which falls well below the usual range of personal capacities subject to these requirements. The scientific findings, if they were to be translated into hiring policies, would clearly rule out policies based on rigid age limits.

One of the higher hiring rates for older clerical workers found during the course of the 1965 study is in the postal service, where appointments are made, under Civil Service regulations, without regard to age. Although postal clerks are engaged in some of the most physically demanding of the clerical occupations, a study made by the Bureau of Labor Statistics of the relative performance of Federal mail sorters in 1963 showed an equal performance level for the older workers.

Here again, the strongest indication of the lack of real basis for most age limitations is the demonstrated willingness of so many American employers to consider older workers on their merits as individuals and to hire them. Although one out of every five of the employers included in the 1965 Employment Service survey hired no new employees among applicants over 45 years of age, another one-fifth hired at least 15 percent in this age group. Many of these firms reported an active policy of recruiting older persons, and praised them for performance and dependability.

It is significant that employers and supervisors often rate their own older workers high on over-all performance, but are at the same time reluctant to hire new employees in the same age brackets.

5. *Arbitrary age discrimination is significantly reduced in States which have strong laws, actively administered, directed against discrimination based on age.*

There are today twenty States which have adopted statutes prohibiting discrimination in employment on the basis of age. (See chart 2.)

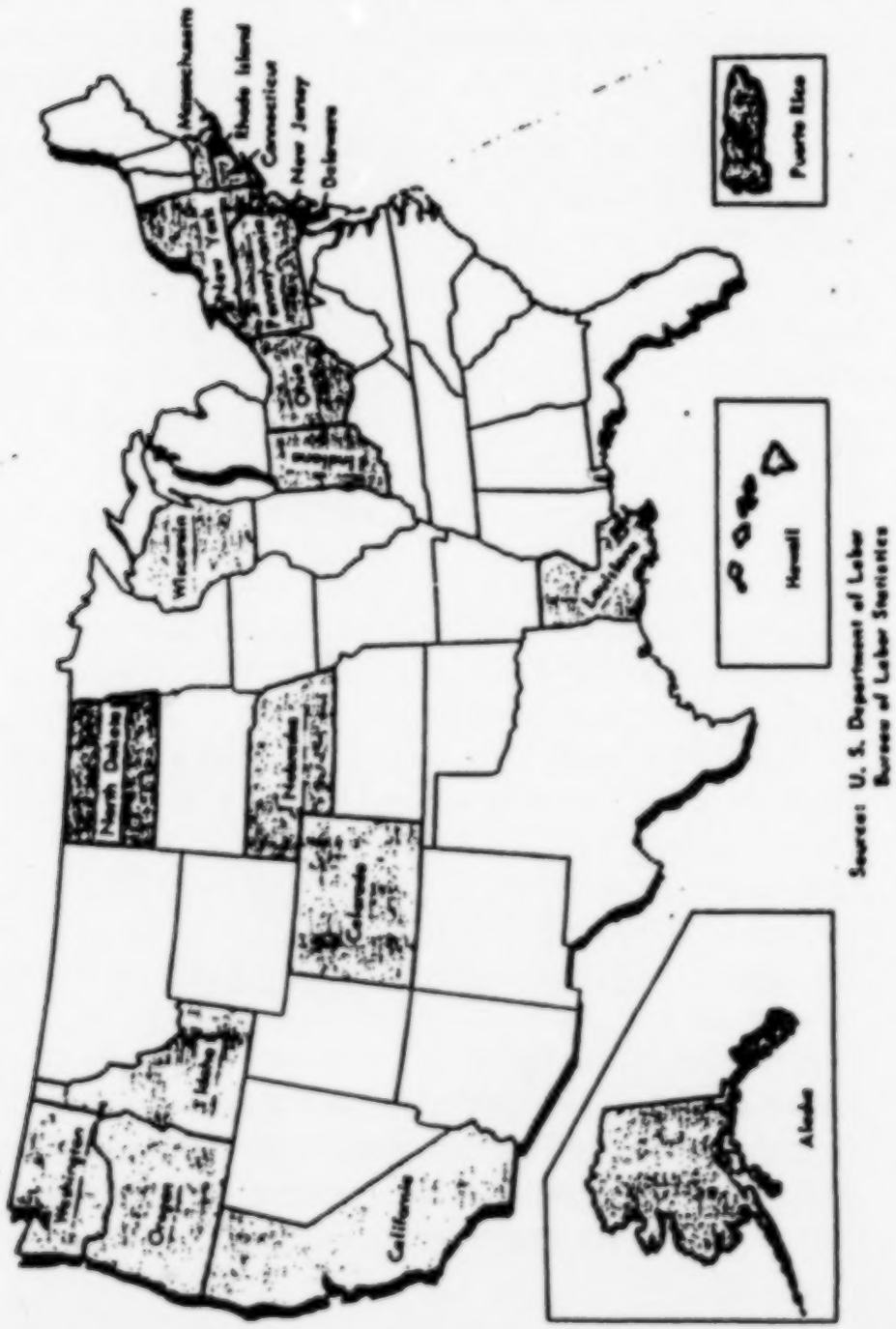
The State laws against discrimination in employment on account of age cover about half of the nonagricultural employment of the U.S. and Puerto Rico:

Colorado (1903)
Louisiana (1934)
Massachusetts (1937 and 1950)
Rhode Island (1956)
Pennsylvania (1956)
New York (1958)
Connecticut (1959)
Wisconsin (1959)
Oregon (1959)
Puerto Rico (1960)
Alaska (1960)
Delaware (1960)
California (1961)
Ohio (1961)
Washington (1961)
New Jersey (1962)
Nebraska (1963)
Hawaii (1964)
Idaho (1965)
Indiana (1965)
North Dakota (1965)

All but three of these laws have been passed since 1955; three were passed in the 1965 legislative sessions. Typically, they apply to employers, employment agencies and labor organizations, with certain exceptions for domestic service, agriculture and small employers. They ban discriminatory practices on account of age, including refusing to hire, discharging, or discriminating in compensation or other terms or conditions of employment. Over half of the States forbid including age limitations in Help Wanted ads or inquiries by employers and employment agencies. Most of these laws are administered as part of Civil Rights legislation.

CHART 2. STATES WITH LAWS PROHIBITING AGE DISCRIMINATION IN EMPLOYMENT, 1965

[Sideways Page customer copy p. 12]



As part of the preparation for this report, a conference of State administrators of age discrimination laws was convened by the Secretary of Labor, in September 1964, to seek their views on the effectiveness of such legislation. This was followed by detailed inquiry into experience in seven States. Experience under these laws is summarized in a special analysis contained in the separate volume of research materials which accompanies this report.

There is clear evidence that in those States where a firm position has been taken, at least the obvious forms of discrimination have diminished, and job opportunities for middle-aged and older workers have increased. The existence of a State law with penalties for violations has made efforts to resolve complaints more effective than has been the case where there have not been such penalties. Age limitations have virtually disappeared from Help Wanted ads in the States which have prohibited them.

However, inadequate funds and staff have limited the effectiveness of these laws in most States. Some have not been implemented at all. In some cases, the broad responsibilities of State agencies to deal with cases of discrimination on account of race, color, or religion, as well as age, have resulted in administrative burdens too large for the staffs that were authorized.

Despite these administrative limitations, the State agencies report numerous cases in which complaints have been adjusted in conferences with employers, with the result that older persons were retained or accepted by employers. More than two-fifths of the complaints from

workers who believed that they had been discriminated against because of their age were found to involve a sufficient degree of arbitrary discrimination to warrant administrative action to bring the employer into compliance.

6. *The Federal Government has adopted a broad and effective policy of nondiscrimination on the basis of age so far as its own employment policy is concerned, and has extended this principle to cover Government contractors.*

The Federal Government's own established policy of hiring on merit through civil Service procedures, without regard to age, is of long standing. Its compulsory retirement age is 70, with occasional exceptions.

Executive Order 11141, issued by President Johnson on February 12, 1964, established a Federal policy against discrimination in employment on account of age by Federal contractors and subcontractors. The Order includes no enforcement provisions and no special administrative machinery for dealing with complaints, providing only that Federal Departments and agencies "take appropriate action to enunciate the policy." Procurement regulations have been amended and the Order has been given wide circulation among larger contractors. Their responses have indicated that the Order stimulated reappraisal of hiring policies respecting age. There have been only a few complaints from individuals and where they have involved violations of the order they have resulted in changes in employer policies.

Executive Order 11141 includes a special provision regarding the elimination of age limitations from employment advertising. A check of Help Wanted ads of Federal

contractors appearing in leading newspapers in 25 cities in the spring of 1965 indicates that less than 5 percent had age specifications.

C. The Necessary Recognition of Forces of Circumstance.

Consideration has been given in the preceding section to the arbitrariness of specific age limitations, indiscriminately applied. It is equally important to recognize the force of certain circumstances which unquestionably affect older workers more strongly, as a group, then they do younger workers.

There can be many reasons why a particular older worker does not get a particular job, and some of them can well be associated with that worker's age. There are differences among people, and some individuals, for a variety of reasons, become less employable as they grow older, just as others become more employable as they grow older.

1. *The health factor is different as between older and younger workers.*

A particular worker may develop a serious health problem which limits his availability for a wide variety of jobs. This health problem would, in the case of a younger worker, have similar effect. But if it is the kind of health problem that is more likely to be serious among older workers, then older workers affected by it are more likely to be rejected for certain jobs on this account.

This in no sense means that it would be reasonable to exclude all older workers from consideration for such

jobs because *as a group* they are more subject to specific health problems associated with growing older. But it does mean that when older workers get considered on their merits, a certain proportion of them fail to qualify.

The medical and psychological findings concerning the abilities of older workers to do specific tasks have already been cited. With increases in the range of individual differences among workers as age advances, it is inevitable that some will fail to meet requirements.

Studies relating health and age have generally found fewer acute illnesses among older than among younger workers, but show that the older ones are more prone to chronic conditions. Chronic conditions may not prevent the employed from continuing to work, but may well result in a higher rejection rate (for example following physical entrance examinations) among unemployed older workers.

The health of the older worker (as well as of the younger) is considerably poorer among the unemployed than among the employed. In 1961-62, days of restricted activity (due to acute conditions) among unemployed 45-64 year olds were twice those of the employed (8.8 versus 4.0). Ten percent of the employed men aged 45-64 had major activity limitations due to chronic conditions; 26 percent of the unemployed had such limitations. Differences between older and younger workers are similarly more pronounced among the unemployed.

2. *The educational attainment of older workers – or the inadequacy of it – is often a bar to their employment for specific kinds of work, either because of inability to meet*

specific job requirements or employer preferences, or because younger workers meet them better.

The fact that most older workers obtain new employment despite rapid technological change indicates the value employers place on their experience, capacities, and stability. But those with inadequate education have far less success in obtaining work than those who are well prepared.

Unemployment rates are inversely related to education in all age groups. Thus, in March 1964, 7 percent of the white male workers 45 years old and over with less than 8 years of schooling were unemployed as compared with 5.4 percent of those who finished elementary school, 2.6 percent of those who finished high school and 1.1 percent of those with 4 or more years of college. The same pattern held true for white women workers.

The pattern for nonwhite workers, though similar, showed less difference because of other factors which result in higher unemployment rates in the nonwhite group regardless of their education: 7.5 percent of the nonwhite men with 8 years of schooling or less were unemployed as compared with 6.3 percent of those who finished high school; percentages for nonwhite women workers in this age group were 6.7 percent and 3.8 percent respectively.

Changes in the nature of jobs and continually rising levels of education have combined to lift employers' educational requirements and preferences. Many older workers now have insufficient education to qualify for the types of jobs which have been growing most rapidly:

medical and dental technicians, nurses, therapists, technical aides in the sciences and engineering, mechanics and repairmen for complex equipment and machinery. Even for many plant production jobs in the major industries, employers for a variety of reasons seek young workers with high school educations or equivalent vocational training.

When older workers are displaced from their accustomed work, they must compete with younger, better educated workers. According to the most recent report on educational attainment of workers, that of the Bureau of Labor Statistics for March 1964, three-fifths of those who are 55 years and over have less than a high school education; more than one in five has less than 8 years of schooling. (See chart 3.)

The schooling of about one in ten white and one in five nonwhite unemployed workers 45 years or over is below the literacy level, represented by five years of schooling, a demarcation point used generally among educators. These older workers usually do not even qualify to enter training programs designed to develop new skills or refurbish outmoded ones, under the Manpower Development and Training Act.

That educational handicap is a barrier to employment is confirmed further by Bureau of Labor Statistics studies in 1962 and 1963 of displaced workers in five different industries: petroleum refining, foundries, and manufacturing of automobile equipment, glass jars, and floor coverings. The older displaced workers who completed high school had substantially less unemployment than those who did not. Displaced workers who were not

seeking employment were primarily the less educated group who gave up hope in view of their combined handicap of age and inadequate education. W. H. Franke and the late R. C. Wilcock of the University of Illinois, in their studies in six midwestern cities in 1960-62, reported similar findings. These studies are cited in the research materials which accompany this report.

Many older workers find it strange and difficult to go back to school as they recall it after many years of work and life. The experience of the Employment Service in serving these older people indicates quite clearly that special efforts are needed to help them over the hurdle of going back to some form of schooling – even at an adult level – and special programs under the Manpower Development and Training Act are being designed for this purpose (with the aid of the National Council on Aging). It has also become clear as a result of efforts under the Manpower Development and Training Act that training must be custom tailored and must be accompanied by special job placement and job development assistance.

The Manpower Development and Training Act program (preceded by the training program under the Area Redevelopment Act for depressed areas) is the first national education and training program directed specifically at the training and educational needs of the unemployed throughout the country. While there is now some means of assisting those who are unemployed, there is, as yet, virtually no means of assisting the employed whose education or training is deficient or outmoded – persons as it were, who are not in trouble, but who are heading for it. The Nation's adult education programs do not reach the great bulk of older people either while they are

employed or afterward. Neither offerings nor educational methods are oriented toward the particular needs and interest of older workers in the population.

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CHART 3 THE OLDER THE WORKERS' AGE GROUP, THE LOWER THE LEVEL OF EDUCATION

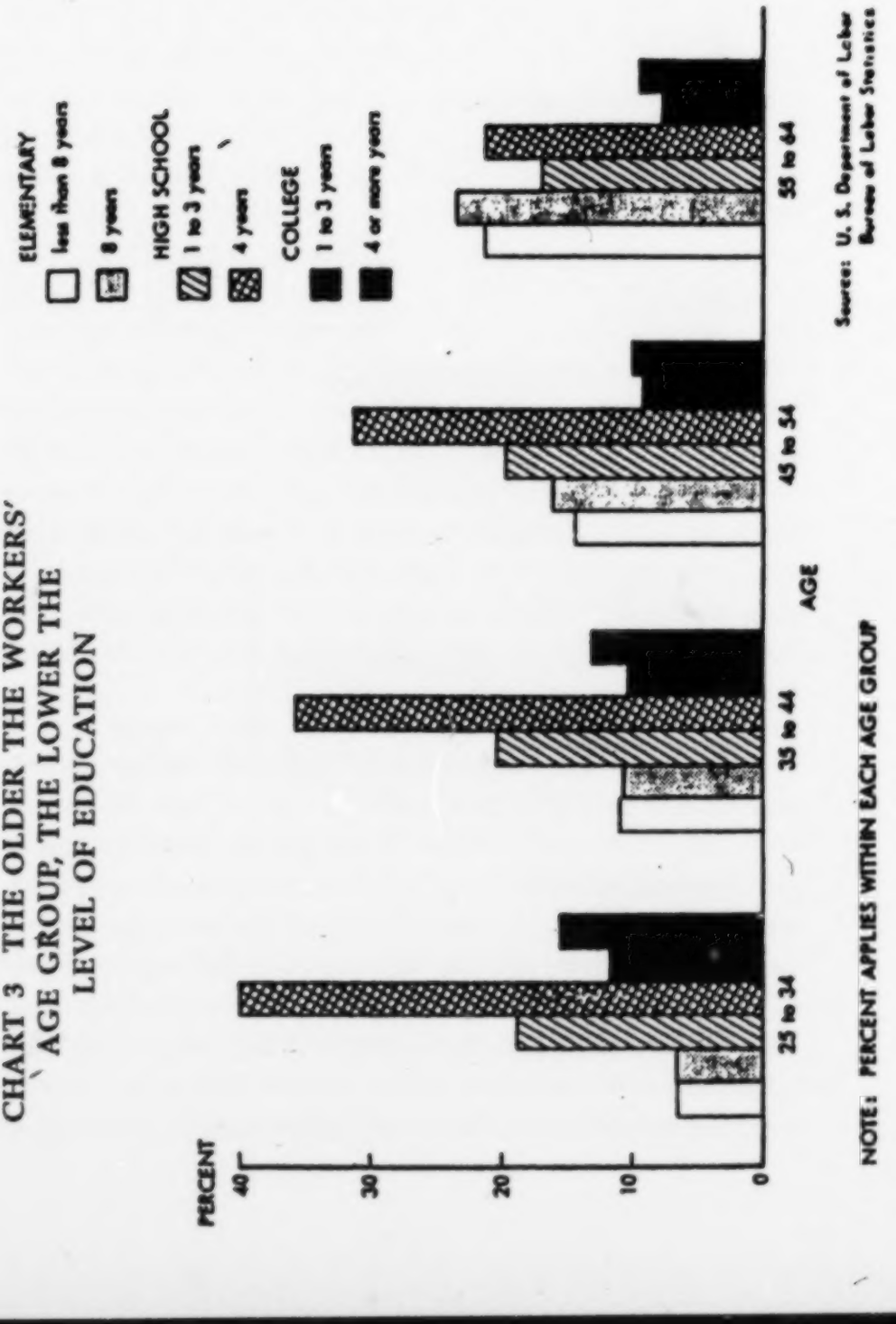


CHART 3 THE OLDER THE WORKERS' AGE GROUP, THE LOWER THE LEVEL OF EDUCATION

3. *Technological change itself affects the older worker's employability, not so much as a factor bearing on individual capacity, but as a significant influence on the environment in which the worker has aged.*

The jobs under new technology are different from those for which the older worker was trained and in which he worked and acquired his experience. Often new jobs are in geographic locations to which younger more mobile workers are attracted; conversely, many older workers are entrenched in areas from which jobs have disappeared.

As new technology displaces older industries and plants and job methods, older workers are especially vulnerable to the changes which follow. Study after study over the last decade has pointed to the same conclusions: those made by Wilcock and Franke, already cited; those made by the Bureau of Labor Statistics; and the experience of the U.S. Employment Service in projects to help displaced workers in cases of plant shutdowns, including the current project in South Bend, Indiana.

Older workers are often in jobs and plants newly established a generation or two ago. Their skills and experience are not always transferable, and the plants and industries which are new today are often geographically distant from the old. As new fuels have supplanted coal, for example, and as coal mining technology itself has improved, older miners have been stranded far from new centers of opportunity. Many of the older consumer goods manufacturing industries have shifted away from the long established centers of population, in response to

new markets and new technology. Older workers displaced as a result of these shifts have often been stranded in the areas of decline. It is the younger workers, less encumbered with family, home, and community associations, who have followed the course of the Nation's industrial advance.

This is true of older workers not only in declining or depressed areas but generally of displaced older workers anywhere when technology changes the character of their jobs or their geographic location. A Bureau of Labor Statistics study of displaced workers from an automotive equipment plant, described in the research materials that accompany this report, illustrates the seriousness of this problem even when transfers to the new locations are offered with full retention of benefits. In this case only one-third of the workers accepted offers of transfer. Many who owned homes had to commute long distances daily to their new work location. Two out of five of those who did not accept transfer were still unemployed 10 months after their layoff.

These changes in technology and in the location of industry have also left older industries with higher than usual concentrations of older workers. In turn, this concentration has given rise to special programs for compulsory or early retirement in "declining" industries – and even in stable or growing industries during periods of economic downturn – designed to open opportunities for younger workers. Moreover, the very availability of Social Security benefits, although yielding only a minimum income (which has to be supplemented from other sources) to workers in retirement, has made it possible to

rationalize involuntary retirements induced for reasons of company manpower or personnel policy.

Further, the development of "special early retirement" incentive programs under private pension plans has opened up additional opportunities for even earlier separation of new groups of older workers. While special benefits are generally offered to induce retirement prior to the normal retirement age, the practice tends to push downward the ages at which employers are willing to employ older workers for new jobs or vacancies.

The pace of technological change, and its effect on the growth and decline of industries, has meant not only changes in the jobs that men hold, but more job changes during their working lives. Workers in the closing decades of this century will have held many more jobs during their lifetimes than did their parents and grandparents. New plants staffed with young work forces may give way to new activity before their workers grow old; a young work force might then come to be regarded as a "normal" work force, and the hiring of older workers as "exceptional."

4. *There is no evidence that unusual numbers of individual older workers fail of selection because of valid advance judgments about expected productivity.*

Obviously individuals in all age groups fail to pass a variety of aptitude and other entrance tests. But there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Judging expected performance is a difficult task. Wide variations in performance exist among individuals of every age group. All of the studies of job performance of older workers have found this to be true in all of the types of work studied.

Studies made by the Bureau of Labor Statistics of job performance of workers in factory production jobs, in office work, and in mail sorting jobs, for example, show that average performance of older workers compares most favorably in office jobs, where productivity equaled that of younger groups and steadiness of output from week to week rose with age, and compares least favorably in production jobs, where average production declined slightly after age 45, somewhat more markedly after age 55, and substantially after age 65. Among the mail sorters, there was no significant production decline until age 65. Studies by the Canadian Department of Labor of retail sales personnel show that peak performance was reached in the fifties (51-55 in one case and 56-60 in the other).

The Bureau of Labor Statistics studies of production workers also show that individual variation from the average in every age group is substantial, indicating that in each of the groups many workers will be found whose performance may be considerably below the average, as well as above average. Over two-fifths of the men 45-54 years of age, and over 30 percent of the men 55-64 years of age in footwear plants had an output per man-hour greater than the average for the age group 35-44. Conversely, of course, 57 percent of those 45-54 and 68 percent of those age 55-64 had an output equal to or lower than the average for the group age 35-44.

These findings show the injustice of judging workers by the average for the group rather than on the basis of their individual abilities. They also show the futility of using past average performance of an overall group to judge superiority and inferiority of a particular applicant for work.

D. Institutional Arrangements that Indirectly Restrict the Employment of Older Workers

A broad range of personnel programs and practices affect the employment of the older worker, although they were not developed for this purpose. Instituted to bring efficiency, equity, order, and improved fringe benefits, they operate with some force against older workers not within their compass.

1. *The efficient operation of modern business requires specialized personnel administration and established personnel rules.*

This often means rather general rules, and the application of general rules – often a "book of rules" – to individual cases. This is as true of hiring policies respecting age as it is of other matters of personnel policy.

The 1965 Employment Service survey found that hiring policies were preponderantly set by central managements, including personnel officials. Yet in only one case in six was a positive nondiscriminatory policy reported with respect to age. The practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity.

2. *Personnel policies are properly designed to establish an orderly system for assignment and promotion of already employed workers.*

Promotion-from-within policies, accepted as desirable by management and worker alike, very often restrict hiring from outside the firm to lower wage entry levels, traditionally regarded as more suitable for younger workers. Staffing to assure the "age balance" of the work force, or continuity of operation by advance designation of successors, also restricts outside recruitment to low-level jobs and younger workers.

Starting the older worker at a low-level job involves not only age balance, but questions of pay. For the experienced worker an entry job often means a reduction in earnings level. Resistance to such cuts in earnings has been found to limit reemployment opportunities in several case studies of displaced workers. Some refusals to hire older workers were explained on this basis by employers cooperating in the 1965 Employment Service study; in other cases employers were reluctant to offer jobs at pay levels they regarded as appropriate for younger workers. Employers also expressed the view that younger workers could in general be employed at lesser rates of pay.

The question of earnings also arises in the administration of unemployment insurance; workers, particularly those experiencing long periods of unemployment, are counseled to be realistic about earnings horizons, and failure to adjust to realistic levels is often cause for disqualification under State statutes. Under the program of Federal extended unemployment benefits proposed by

the president and contained in H.R. 8282 and S. 1991, greater emphasis is to be placed on such counseling of unemployed workers.

3. *Seniority systems which generally protect older workers in their jobs – because of longer service, not age as such – sometimes operate to impede the employment of other older workers with long industrial service but without recall rights in particular seniority units.*

Where seniority units for layoff purposes are narrow they may result in layoffs of workers who have longer service than workers in other seniority units who are retained. And while older workers are being laid off in one seniority unit, new workers may – under some collective bargaining agreements – be hired in another.

4. *Employer attitudes toward the hiring of older workers are affected by fear of rising costs under recent court decisions interpreting State workmen's compensation laws.*

As a result of court awards for disabilities stemming from pre-existing conditions such as arthritis, heart malfunction, diabetes, and other degenerative diseases that employers had contended were not job related, some employers are becoming reluctant to employ older workers (as well as handicapped workers). Further information on these developments is contained in the research materials which accompany this report.

Neither the operation of the workmen's compensation laws nor of the unemployment insurance systems can be expected to lessen employer concern over such costs. What is involved is a major gap in coverage for

disabilities that are not job related – a gap which itself erects a barrier to the employment of the older worker.

5. *The private pension, health, and insurance plans which have improved the situation of employed workers are probably affecting adversely the hiring of unemployed older workers.*

It is not clear to what extent these restraints arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs. A recent Bureau of Labor Statistics analysis of the costs of these plans, and extensive actuarial calculations covering pension costs, are summarized in the research materials which accompany this report.

Private pension plans now cover more than a third of the nonfarm work force and health and insurance arrangements cover three out of four. There are many types of plans, ranging from pension and health and insurance packages purchased by companies willing to spend specific amounts of money to elaborate self-insured arrangements.

The variety of these plans is paralleled by variations in their costs. Under one important group of pension plans, for example, average annual costs, if calculated separately by age groups, is about $80 a year higher for workers hired in their late forties than for workers hired in their late twenties. This does not necessarily mean, however, that overall costs increase when firms follow policies of hiring older workers. Where vesting of employee pension credits is provided, the differential costs are smaller. Moreover, where benefit formulas are based largely on highest earnings or earnings during the

last few years of service, the ultimate pension costs could be greater for newly hired young employees than for older ones.

Since life insurance plans are group plans, the most important cost factors are the average age and experience of the group. If turnover keeps average age relatively constant, employers are free to hire older workers without added cost.

When insurance costs are calculated by age groups, they are as a whole related to age. The BLS study estimates that for large employers, net insurance premiums after dividends for a $5,000 life insurance policy are almost $3 per month higher for workers 45 to 54 years old than for those under 45, and $8 per month more for workers 55 to 64.

Age is a far less important factor in health care; differential costs basically depend upon marital status and family coverage rather than age. Costs for married workers and their families are about the same for all ages up to nearly 65. For large plans, the net cost for single men – who are less than a third of all nonfarm male employees – although much lower than for married men with families, show differentials of about $3 per month for men 45 to 54, and $5 per month for men 55 to 64, over costs for workers under 45. Accident and sickness plans show similar cost differentials.

The overall cost of a health and insurance program will be affected by experience rating (although this does not apply in a large number of cases), by funding methods, and by hiring policies which affect experience. The cost of a typical health and insurance package for a

company with a hiring policy that concentrates on young workers may prove to be less than that for a company with balanced hiring in all age brackets.

Cost considerations do not, however, always operate against the older worker. Where benefit formulas yield smaller pensions for newly hired older workers the costs are not greatly affected; where central funds are established, as in multiemployer plans, an individual employer's contribution is not ordinarily affected. Similarly, the purchase of group insurance is often handled without regard to changes in the age distribution of the work force, and medical insurance is often purchased from community organizations at communitywide rates. In some cases, special plans have been developed which are neutral with respect to the relationship of cost to age. Older workers are widely hired by employers with pension and insurance plans as well as by those without such plans.

Relatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons when interviewed during the course of the 1965 Employment Service study of employer hiring practices and policies. Even in cases where they mentioned pension and insurance, cost was not the principal factor involved. Rather, what was cited was the company policy of excluding new employees beyond a certain age from coverage under pension plans – exclusions generally developed because of the time required to build up minimum credits – and in the case of insurance presumed inability to pass physical examinations.

The age exclusions under pension plans vary widely from under age 50 to over age 65; more than a third of them are set at or below age 55. (See chart 4.)

They undoubtedly have an effect upon hiring age limits. Employers in some cases are averse to hiring workers excluded from major fringe benefits. In other situations they are reluctant to provide a reduced and less costly level of fringe benefits. In still other cases they may be reluctance [sic] to provide regular pension benefits if special additional costs would be in involved.

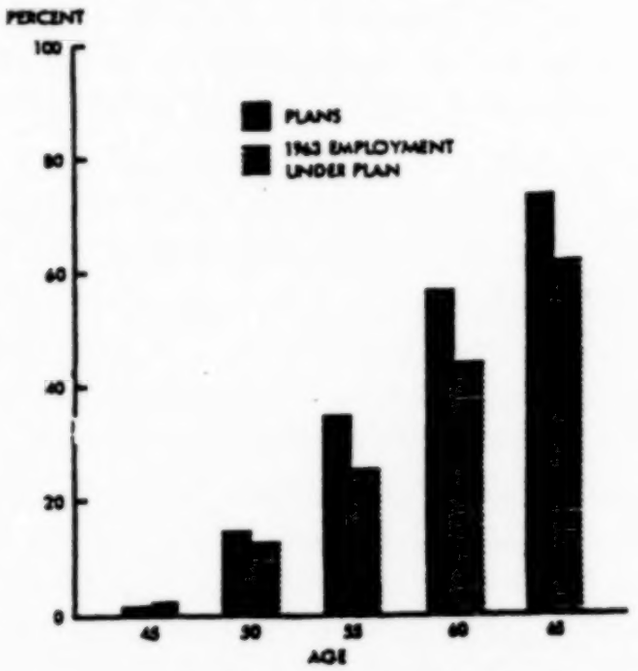
Hiring age exclusions are often lower than pension plan age limits. The lower the established retirement age, the lower the hiring age is likely to be, to allow sufficient time for acquiring pension eligibility and earning an adequate pension. While 65 has been the usual age for normal retirement in most private pension plans as well as in OASDI, there has been some lowering of this age in recent years. In addition, recently negotiated "special early retirement" clauses, which provide higher benefits than "normal" as incentives toward earlier retirement, can accelerate this trend toward earlier retirement, lower further the actual age of retirement, and exert more pressure on maximum hiring ages. In some cases these provisions bar the reentry of workers into certain types of activity, either in the same craft or industry.

The spread of compulsory and automatic retirement provisions has also lowered the age of retirement for many who want to continue to work beyond age 65. About one-third of men retired under OASDI regard their retirement as involuntary, as do about 10 percent of those retired under early retirement plans in recent years,

according to Department of Health, Education, and Welfare and Cornell University surveys.

Provisions which enable workers to carry earned pension credits with them to new employment could aid the reemployment of older workers.

CHART 4. A THIRD OF PRIVATE PENSION PLANS EXCLUDED WORKERS HIRED AT AGE 55 AND OVER HALF AT AGE 60.



Source U.S. Department of Labor, Bureau of Labor Statistics

Vesting provisions are found in about 2 out of 3 plans covering 3 out of 5 workers under private pension plans, according to a recent analysis by the Bureau of Labor Statistics. If vested rights from previous employment were added to the pension credits the older worker

would earn in his new employment, his pension could be considerably higher than could otherwise be provided without added cost. This or other arrangements to facilitate portability of credits could reduce present employer reluctance to hire older workers.

Vesting would also narrow the present cost advantage that favors younger workers, and which arises partly because younger workers, without vesting and with greater turnover, often forfeit their pension rights.

The extent to which the range of pension plan-induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in the light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

The Consequences of Such Discrimination on the Economy and Individuals Affected

The consequences of discrimination embrace a wide range of production loss, human hardship, and frustrations. This may well include the loss of important innovations in the fields of science and technology. Since our society has by no means yet worked out the role to be played by older workers in their later productive years of life, what remains here is an unmeasured as well as untapped resource.

A. The Consequences to the Economy

It is a fair estimate that a million man-years of productive time are unused each year because of unemployment of workers over 45; and vastly greater numbers of years are lost because of forced, compulsory, or automatic retirement.

The total costs to the Nation's economy of the combination of factors which underlie discrimination on account of age cannot easily be calculated. Even where the loss is tangible it is possible to make only very rough approximations; moreover, it is difficult to differentiate the effects of discrimination from other influences.

A substantial portion of the unemployment insurance payments of $1 billion a year to workers 45 and over can be attributed to unemployment resulting in one way or another from the fact of the employee's age. Some of these payments, of course, would go to workers who are between jobs even under conditions of full employment; nonetheless, a large but incalculable proportion involves long-duration unemployment that reflects the difficulty which the older worker faces in attempting to find a new job. The Nation loses, furthermore, potential production in an amount at least two or three times the size of the unemployment insurance payments that might be attributable to discrimination.

It is impossible to estimate what proportion of these costs of unemployment insurance and lost production results form "arbitrary" discrimination, of the kind which might be dealt with by a statute prohibiting discrimination in employment on the basis of age.

Only a hypothetical calculation can be made of the potential contributions of those who have retired involuntarily. Such a calculation would easily yield several billion dollars a year on the assumption that the participation rate for males 65 and over (in either paid or voluntary activity) might rise to a point about halfway between the present labor force participation rate (28 percent) and the 1948 rate of 47 percent (less than half the participation rate for lower ages), and that earnings would not on the average exceed the amounts possible without reduction of OASDI benefits. The fact that about one-third of the men retiring under OASDI regarded their retirement as involuntary – as previously indicated – suggests that these assumptions may not be unreasonable. Moreover, the results of this calculation are similar to those of the late Professor Sumner Slichter who in 1952 estimated $3.8 billion in 1951 prices as a conservative measure of "present loss of production from retired workers."

B. The Consequences to the Individual

The position of the individual older worker, relative to the position of workers in the prime age groups, reflects not only relative disadvantage, but deterioration as well.

The unemployment rate of male workers 45 and over last year was one-fifth greater than the rate in the 35-44 year group.

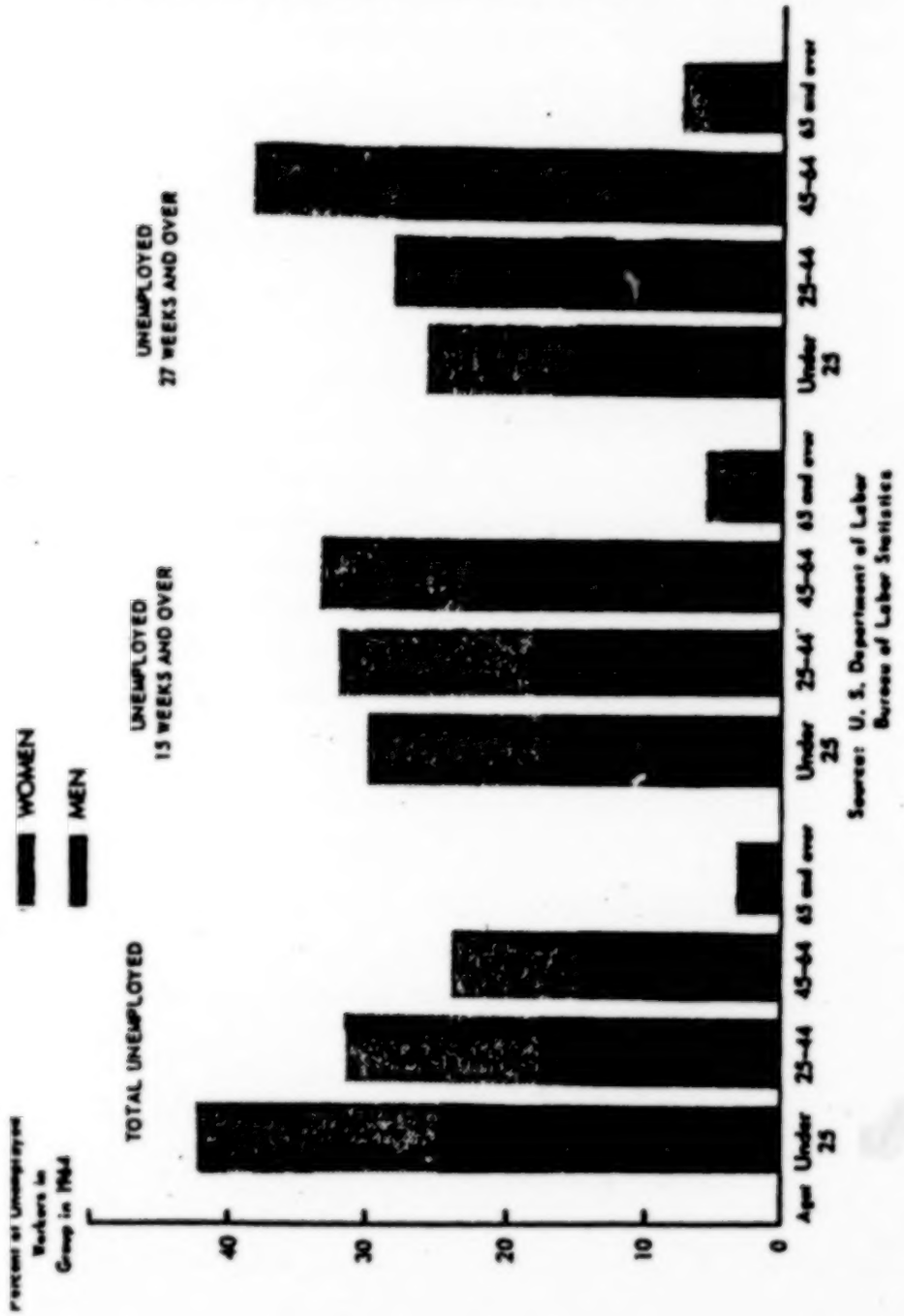
Older workers (45 and over) experienced more long-term unemployment than younger groups. (See chart 5.)

On the average this unemployment lasted 8 weeks longer – about 75 percent longer – than the average duration of unemployment for workers under 45.

The proportion of the very long-term unemployed (over 27 weeks) made up of men 45 and over has been rising in the face of a generally improved employment situation: from 31.5 percent in 1961 to 33.6 percent in 1964 and has begun to improve only in recent months – a lagging improvement of the kind that has in the past generally characterized the unemployment situation of older workers after each period of downturn or inadequate growth.

This development is often accompanied by another kind of deterioration that cannot be measured – deterioration of skill and motivation, with consequent reduced acceptability to employers.

CHART 5. LONG-TERM UNEMPLOYMENT FALLS MORE HEAVILY ON THE OLDER WORKER



Limited literacy and basic education have inhibited the retraining of older workers under the Manpower Development and Training Act. They are in fact badly underrepresented in such training. While workers 45 and over constitute 27 percent of the unemployed, they represent only 11 percent of MDTA trainees. This situation can be remedied to some extent under the literacy amendments to the act. But it will also be necessary to overcome the present administrative inhibitions which arise in part from the MDTA requirement concerning prospective employment opportunity.

The consequences of discrimination on the individuals affected go far beyond those attributable to arbitrary refusal to employ on the basis of age.

They show up in widespread uncertainty concerning the role of rigorous older persons in our society, and in personal frustrations and anxieties. While the opportunity to retire with some income has meant leisure and escape from routine for a great many, it has also created new uncertainties, particularly where *opportunity* to retire has been converted into *forced* retirement, and where there is no new opportunity for satisfying occupation.

While the economic situation of retired workers has steadily improved with the increases in retirement benefits, it is still of great concern that almost one-seventh of the Nation's poverty problem involves low-income persons over 65. The vast majority of older persons have virtually no financial assets to supplement their pensions. Many are barely outside the poverty border: over 40 percent of married couples with one member over 65 had incomes in 1962 of less than the $2500 required to meet

the budget estimated by the Bureau of Labor Statistics as being "modest but adequate" for a retired elderly couple.

III. Conclusions and Recommendations

It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

The firmest conclusion from this year long study is that the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as "arbitrary" and to concentrate on the prohibition of practices which include this element.

A larger, more informed effort is required.

To the extent that arbitrary discrimination occurs, it can and should be stopped.

To the extent that obstacles exist to the employment of older workers because of limitations in their abilities, these abilities must be enlarged.

To the extent that the process of matching men and jobs is working to the disadvantage of older workers, the process must be improved.

To the extent that employment security and income maintenance programs are having a wholly unintended adverse effect on the position of older workers who are unemployed, these programs must be adjusted.

All these things are possible, given a national will and a national effort.

Such an effort will include four types of programs.

First: *Action* to eliminate arbitrary age discrimination in employment.

Second: *Action* to adjust institutional arrangements which work to the disadvantage of older workers.

Third: *Action* to increase the availability of work for older workers.

Fourth: *Action* to enlarge educational concepts and institutions to meet the needs and opportunities of older age.

These recommendations are made pursuant to a Congressional directive that a study be carried out and that the Secretary of Labor report the results of such study and "include in such report such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." These recommendations derive only from the directive and the study. They do not constitute proposals by the Administration. Their ultimate consideration will necessarily be as part of a broader balancing with other important measures involving other needs.

Action to Eliminate Arbitrary Age Discrimination in Employment

There is persistent and widespread use of age limits in hiring that in a great many cases can be attributed only to arbitrary discrimination against older workers on the basis of age and regardless of ability. The use of these age

limits continues despite years of effort to reduce this type of discrimination through studies, information and general education undertaken by the Federal Government and many States, as well as by nonprofit and employer and labor organizations.

The possibility of new *nonstatutory* means of dealing with such arbitrary discrimination has been explored. That area is barren.

State experience with statutes prohibiting discrimination in employment on the basis of age indicates that such practice can be reduced by a well-administered and well-enforced statute, coupled with an educational program. It is clear from this experience that an educational program to promote hiring on the basis of individual merit is far more effective when provided for by statute.

The elimination of arbitrary age limits on employment will proceed much more rapidly if the Federal Government declares, clearly and unequivocally, and implements so far as is practicable, a national policy with respect to hiring on the basis of ability rather than age.

Such implementation should emphasize the role to be played by persuasion and education, both in general and in individual cases of alleged violations of policy, and should provide for action in the event that persuasion and education fail.

Specific provision should be made for handling instances of *alleged* arbitrary discrimination where the facts of the case indicate that the older worker in question needs reeducation, training, counseling, or health and other services. In these cases the individual should be

referred to the appropriate programs for needed assistance.

While State laws have been increasing in number, some are not implemented at all, and, with few exceptions, the State resources have been inadequate for assuring effective compliance. Activities on behalf of older workers have had a tendency to become submerged in broader programs to prevent discrimination on account of race, color, or religion.

A clear-cut and implemented Federal policy against arbitrary discrimination in employment on the basis of age would provide a foundation for a much needed vigorous, nationwide campaign to promote hiring on the basis of ability rather than age.

Action to Adjust Institutional Arrangements Which Work to the Disadvantage of Older Workers

To eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring.

This will require special arrangements to overcome employer reluctance to hire qualified workers under present pension and seniority arrangements. It will be necessary to modify some existing arrangements, to encourage new kinds of employer and union actions, and to explore additional steps to be taken by the Federal Government.

1. The report of the President's Committee on Corporate Pension Funds and Other Private Retirement and Welfare Programs, issued in January 1965,

includes a wide range of recommendations for public policy regarding private pension plans. One important recommendation aimed at wider adoption of vesting provisions in private plans would improve employment opportunities for older workers. Another recommendation which would have long range beneficial effects in this regard called for a study of the feasibility of a system of portable pension credits. These proposals should be given prompt and full consideration.

2. New forms of private annuity coverage for older workers not covered by present private pension arrangements should be encouraged, and consideration given to the status of such annuities under the tax laws. Such arrangements could provide annuity coverage in cases where costs inhibit the hiring of older workers, without requiring the modification of the existing pension plan.

3. A comprehensive formal review of the gaps and inadequacies of present systems of workmen's compensation and disability insurance should be undertaken.

4. Methods should be developed for assisting private parties in collective bargaining to work out procedures which would open opportunities for hiring unemployed workers with long industrial service, while protecting the seniority rights of workers who are already employed.

Action to Increase the Availability of Work for Older Workers

The fundamental fact that will determine the situation of the unemployed older worker is the condition of

the national economy. So long as there exists a considerable body of unemployed persons, the unemployed older worker will be competing for jobs at a disadvantage. By and large, the hard present facts of education, training, and mobility work to the advantage of younger workers. Full employment comes first in any serious intention to eliminate the disadvantages which unemployed older workers must overcome.

Given a high and expending level of employment, however, a vigorous nationwide employment effort, with new and improved arrangements directed at the needs of older workers, is required to provide the special counseling, training, and placement attention that will lead to job opportunities.

The United States Employment Service and the affiliated State services constitute the basic operating resources for getting this job done. Where concentrated efforts have been made in behalf of older workers, the experience of the Employment Service clearly shows that substantial employment opportunities can be developed. But a fully adequate program will require

- additional intensive individual counseling and group counseling with specially trained counselors available for older workers, including veterans (many of whom are now in their forties and fifties) and military retirees;

- the organization of new job-finding community activities, including self-help groups;

- the development of *part-time* employment opportunities;

- referral to appropriate retraining projects and basic education courses, or to other facilities and services such as those provided in the field of vocational rehabilitation or to be provided under the pending Older Americans Act;
- the organization of community efforts to change employers' attitudes toward rigid age restrictions;
- intensification of programs for dealing with mass layoffs from plant shutdown, whether related to changes in defense programs or in civilian production.

It will also require, under the Manpower Development and Training Act.

- larger provision for training and retraining opportunities for older workers, especially through on-the-job training;
- development of new and more effective methods of training adult workers;
- more opportunities for basic education and income supplements to make this education practicable.

To achieve all this will call not only for action in new directions but for special leadership and attention to the problems of the older worker at a key point in the administration of the Nation's manpower programs. This should be a matter given special attention in developing the nationwide employment effort.

Labor and management must be relied on to work out techniques to help older workers meet the requirements of new jobs while they are still employed, and thus forestall the likelihood of unemployment. Several specific

possibilities were emphasized in the 1962 Automation Report of the President's Advisory Committee on Labor-Management Policy:

- planning job changes in advance;
- cooperation between management and employee representatives to meet the problems involved;
- open reporting to the employees involved;
- timing of changes to take advantage of expansion and attrition;
- institution of severance pay programs based on length of service.

Techniques for the advance planning of manpower requirements are being applied in a number of industries, and have been used successfully in several difficult disputes over adjustment to technological change.

Techniques are only beginning to be developed for the redesign of jobs to permit greater numbers of older workers to function effectively and at high levels of productivity.

Techniques are being developed for effective pre-retirement planning which can mean the difference between good and poor adjustment. They encompass financial planning, living arrangements, the managing of money, health problems, and the question of what to do with one's time. They are best carried out at the work location and where possible under joint labor-management sponsorship.

There are many community tasks on which older persons can be employed. There are substantial community needs that have not been met, and for which local

authorities do not have funds. A great deal of this work can be done by older workers, and would be if Federal assistance were available in a form similar to the present financing of the Neighborhood Youth Corps. Community work would recapture and preserve human abilities, utilize manpower, provide satisfying occupation, and forestall additions to the mounting welfare case load.

Local communities should be encouraged and assisted to develop employment opportunities in cooperation with private enterprise as well as through public and non-profit agencies. Participation by private enterprise in the administration of parts of the War on Poverty, in connection with the Job Corps camps and work experience projects, and in the on-the-job training programs under the MDTA and President Johnson's Job Development Program, open new horizons for ingenuity and innovation. There are, and are likely to continue to be, however, tens of thousands of workers with inadequate sources of income and no employment prospects, who are over 55, have exhausted unemployment compensation, and are not yet eligible for retirement benefits. It is not right or reasonable that those whom the economy has displaced at ages between 55 and 65 in the course of technical progress, and whom it will not take back into productive employment, should suffer because of the unavailability of work opportunity. A special program to meet the income needs of this limited group should be considered not only on its own merits but to reduce the growing pressure for a costly early retirement system.

Action To Enlarge Educational Concepts and Institutions To Meet the Needs and Opportunities of Older Age

There is a still broader dimension to all this.

The difficulties of being an older worker are only part of the difficulties of being an older person. There has been too narrow an emphasis on "work," too little recognition of the broader concept of "function" – and the difference gets clearer when an individual's time for work is running out but his capacity, and need, to function continue: Part of age discrimination in employment and part of the answer to it involve this relationship between work and function: for it is wrong to think so much in terms of a person's right or desire to keep on indefinitely at the kind of thing he has always done.

Yet as things now stand, most people's education and their experience are directed largely at what they do during their "lifetime's work" and not at all at what they will do when that work tapers off but a lot of life remains to be lived.

What this study has made clear and this report must convey is the working of two powerful, related, but in a sense opposing processes: men and women are living longer lives than before; but during their lives the world – of ideas, of institutions, of work and function – is changing more rapidly than ever before.

Through most of history, life has been a process of a steadily increasing maturity and growing understanding of the world in which one lives. Suddenly, as life grows

longer, the sum total of human knowledge is compounded faster, the pace of technological progress accelerates – and the process of getting older presents the prospect that as an individual ages he or she will become less, rather than more, familiar with the essential facts of life.

In certain profound ways, people today *diminish* during their lives, in understanding. Today's adult finds the grade school mathematics of his children difficult if not impossible to grasp. H. G. Wells described civilization as a race between education and catastrophe. Acknowledging that to fall hopelessly behind events in middle age is indeed a catastrophe, means facing the further fact that more and more persons are losing that race.

If this appears removed from the issue of age discrimination in employment it is necessary to say plainly that most of those who suffer the worst employment disadvantage with their advancing years are those with the least preparation for the changing demands of those years.

The point has now been reached where almost every boy and girl from age 6 to 16 is in school and a great majority of them finish high school. A much smaller number, about one in four, go on to college, and the evidence is clear that those who do are on the whole well equipped to keep abreast of developments as they go through life. Their education never really stops, or they are at all events able to resume it when necessity or interest indicates that they should do so.

But what about the others, those who leave off their education at high school, or before. The time when a

person could, before he was sixteen or eighteen, acquire a set of skills, or ideas, and make do with them for life, is gone. If anything is certain, it is that most of the members of this group, particularly the wage earners, will sooner or later urgently need further education and training. It is almost an iron law of the coming age, or indeed the present age. Yet there are at present only the most limited arrangements available to provide that education and training. The direct needs of American wage earners, and the larger interests of American society, require that bold thought be directed to means by which we can enable persons who did not attend college in their youth to resume their education on meaningful and productive terms later in their life.

A new system of continuing educational opportunity should be developed for achieving better preparation of our older workers for economic and job changes, to make them less vulnerable to displacement, to protect them against discrimination, and to open the way to more satisfying activity in retirement.

- These opportunities should make it possible for individual workers to receive modern educations which will make up for earlier failure to complete grade school or high school, and should open opportunity for educational and technical refurbishment.

- They should include appropriate financial assistance for limited but adequate periods of time. It will be important to explore a variety of methods by which new types of adult education can be woven into work life.

- The financing of these new opportunities should be a matter of thorough study. Consideration might be given, for instance, to the possibilities of a new system of contributory insurance for educational credits for workers.

A program along these lines, in addition to providing an entirely new horizon of opportunity to those in the work force who are over 45, can also open new job opportunities for others while older workers are on "educational sabbaticals." It can lead to the innovations and economic growth that new combinations of experience and modern education can provide, can furnish a basis for a new type of economic activity, and can be a constructive form of distributing reduced hours of active work in our society. A 1-year educational sabbatical, for example, is roughly the equivalent of a 1-hour reduction in weekly hours over a working life. A 3-month educational sabbatical is equivalent in time to an added coffee break each week of working life.

The basic reply then to the Congress' inquiry about what is required to prevent age discrimination in employment is that there should be provided the opportunity for full *participating* membership in the society until death – and that continuing education is the necessary and only possible qualification for such participation.

All this is not the work of one legislative program, nor of one legislative session, but the time is at hand to go ahead. "Knowledge comes," Tennyson wrote, "but wisdom lingers." We possess the knowledge in general terms of what must be done. This report is offered in the

sincere hope that it will help muster the wisdom to proceed.

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(8)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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87 pp

QUESTION PRESENTED

The petitioners were fired as part of a corporate downsizing in which more than 70% of the persons fired were, like them, at least 40 years old. They alleged that the downsizing disproportionately impacted the older workers within the company. The court of appeals held that the Age Discrimination in Employment Act of 1967 did not under any circumstances permit a disparate impact method of proving age discrimination. The question presented is:

Is a disparate impact method of proving age discrimination available to plaintiffs suing under the ADEA and, if so, under what conditions?

LIST OF PARTIES

In addition to the persons named in the caption, the petitioners in this proceeding are James Akin, Linda Baldwin, Willis Barnes, Elaine Barnes-Foster, Philip Bassa, Larry Bayes, Patsy Baynard, James Beck, Cheryl Becker, Gary Becker, Cynthia Behrens-Boga, Earl Bettis, Richard L. Boreman, Jerold A. Boyle, Linda Boyle, Gerald Brannen, Joe N. Brannon, Donald Breeden, Donald P. Broeckel, Richard Brown, Lorin Bryan, Robert Bunch, Judith A. Carey, Thomas Catlett Jr., Charles Coffman, Marjorie Copeland, Kenneth Corbett, Earl Doby, Samuel Dupuy, Tom Engers, Gwendolyn Evans, Paul Fintak, Leo L. Floyd, Ray Forehand, Mark Foster, Gregg Frangipane, Robert Freeland, John Fremgen, Valerie Fronza, John Gallagher, Narendra Garg, Mickey Gauldin, Polly Gillespie, Ralph Graves, Linda Groseclose, Michael Harmeling, Thomas Hays, Eugene Hayward, Gopal Hegde, David Hodgson, Peter Holliday, Roy C. Hooks, William E. Hoover, Dayton Jackson, Douglas Janowski, Carrie Jones, William Kenefik, Stephen Koon, Gerald Lamm II, Kermit Lassiter, Saranan Lauck, Thomas Livingston Jr., Raymond P. Long, Linda Maraget, John Mascoll, Robert Mason Jr., Gloria Maxwell, Mary McCoy, Carol McFadden, Annie McKinney, Richard Merriman, James Moock, Michael Moore, David Morris, Thomas Neaman Jr., James L. Owens, William Passmore, Adolfo Paz, James M. Pennington, Mark Petersen, Andre Poulard, Trevor Daniel Putnam, Marcia Quinn, David Reed, Joe Reid, William B. Rich, Alexa Richardson, Terrance W. Ryan, Patti Jo Vitte Schmidt, Lorene Scott, Terrie Scott, Randy Seifert, John

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The respondents in this proceeding are named in the caption.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS INVOLVED	1
STATEMENT	2
A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw	2
B. Proceedings Below	7
SUMMARY OF ARGUMENT	13
ARGUMENT	17
I. THE ADEA PERMITS OLDER WORKERS TO PROVE AGE DISCRIMINATION THROUGH DISPARATE IMPACT	17
A. Giving Effect to the ADEA's Written Words	18
1. The ADEA expressly permits claims based on disparate impact	18
2. The ADEA's prohibitions and related affirmative defenses strongly indicate that disparate impact is an available means of proving age discrimination	22
a. The terms "because of" and "based on" do not mean the same thing in the ADEA	23
b. The reasonable factors requirement	27

TABLE OF CONTENTS – Continued

	Page
B. The Bennett Amendment to Title VII	29
1. The True Meaning of *Gunther*	29
2. Yes, the Reasonable Factors Defense is an Affirmative Defense	32
C. Administrative History	34
D. The Statistics the OWBPA Requires for Downsized Employees Have Little if any Meaning for those Employees Apart from Consideration of Disparate Impact Claims	37
E. The Subjectivity of Florida Power's Downsizing Process Further Militates in Favor of Using the Disparate Impact Method in this Case	41
II. WHAT ARE REASONABLE FACTORS OTHER THAN AGE, AND HOW DOES THE DEFENSE OPERATE?	42
CONCLUSION	44
APPENDIX	1a

TABLE OF AUTHORITIES

Page

CASES

Allison v. Western Union Telephone Co., 680 F.2d 1318 (CA11 1982) 5

Bank One Chicago v. Midwest Bank & Trust Co., 516 U.S. 264 (1996) 17

Bates v. United States, 522 U.S. 23 (1997) 25

Bingler v. Johnson, 394 U.S. 741 (1969) 35

Brown v. Gardner, 513 U.S. 115 (1994) 23

Carter v. United States, 530 U.S. 255 (2000) 17

Chevron USA v. Natural Resources Defense Council, 467 U.S. 837 (1984) 11

C.I.R. v. Lundy, 516 U.S. 235 (1996) 26

Connecticut v. Teal, 457 U.S. 440 (1982) 28

Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 22, 30

County of Washington v. Gunther, 452 U.S. 161 (1981) 29, 30, 31, 42

Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989) 23

DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (CA3 1995) 20

Douglas v. Anderson, 656 F.2d 528 (CA9 1981) 5

Duncan v. Walker, 530 U.S. 167 (2001) 17, 22, 25

Edwards v. Shalala, 64 F.3d 601 (CA11 1995) 11

TABLE OF AUTHORITIES – Continued

Page

EEOC v. Francis W. Parker School, 41 F.3d 1073 (CA7 1994) 17, 29

EEOC v. Governor Mifflin School District, 623 F. Supp. 734 (E.D.Pa. 1985) 7

EEOC v. Wyoming, 460 U.S. 226 (1983) 3

Ellis v. United Airlines, Inc., 73 F.3d 999 (CA10 1996), *cert. denied*, 517 U.S. 1245 (1996) 31, 35

Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 17

Finnegan v. Trans World Airlines, 967 F.2d 1161 (CA7 1992) 6

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 23

Geller v. Markham, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981) 5

General Elec. Co. v. Gilbert, 429 U.S. 125 (1976) 18

Great-West Life & Annuity Ins. Co. v. Knudson, ___ U.S. ___, 2002 WL 15399 (January 8, 2002) 20

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5, 6, 11, 35, 36

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) .. *passim*

International Brotherhood of Teamsters v. U.S., 431 U.S. 324 (1977) 28

Jones v. Runyon, 32 F.3d 1454 (CA10 1994) 11

Laugesen v. Anaconda Co., 510 F.2d 307 (CA6 1975) 5

Leftwich v. Harris-Stowe State College, 702 F.2d 686 (CA8 1983) 5

TABLE OF AUTHORITIES – Continued

Page

Lorillard v. Pons, 434 U.S. 575 (1978) 3, 4, 7

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 3

Metz v. Transit Mix, Inc., 828 F.2d 1202 (CA7 1987) 35

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Mullin v. Raytheon Co., 164 F.3d 696 (CA1 1999), *cert. denied*, 528 U.S. 811 (1999) 20, 31, 35

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Ohio Public Employee Retirement Sys. v. Betts, 492 U.S. 158 (1989) 32, 33

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 4

Oubre v. Entergy Operations, 522 U.S. 422 (1998) 40

Pauley v. BethEnergy Mines, 501 U.S. 680 (1991) 11

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Russello v. United States, 464 U.S. 16 (1983) 25

Sorenson v. Secretary of Treasury, 475 U.S. 851 (1986) 26

Sullivan v. Stroop, 496 U.S. 478 (1990) 26

Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) 32, 33, 34

TRW Inc. v. Andrews, 122 S. Ct. 441 (2001) 22

TABLE OF AUTHORITIES – Continued

Page

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United Independent Flight Officers v. United Air Lines, 572 F. Supp. 1494 (N.D.Ill. 1983) 5

United States v. Rutherford, 442 U.S. 544 (1979) 37

Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) 6, 15, 37, 42, 43

Washington Market Co. v. Hoffman, 11 Otto (101 U.S.) 112 (1879) 23

Watson v. Fort Worth Bank and Trust, 487 U.S. 977 (1988) 17, 28, 41

Western Airlines v. Criswell, 472 U.S. 400 (1985) 37

STATUTES AND REGULATIONS

Age Discrimination in Employment Act,

29 U.S.C. § 621 1

29 U.S.C. § 622 1

29 U.S.C. § 623 ..... *passim*

29 U.S.C. § 625 1

29 U.S.C. § 626 ..... *passim*

29 U.S.C. § 628 1

29 U.S.C. § 630 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1292(b) 10

28 U.S.C. § 1331 8

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 206(d)(1) 1, 10, 12

29 U.S.C. § 216(b) 10

42 U.S.C. § 2000e-2 ..... *passim*

29 C.F.R. § 860.103 (1986) 2, 5, 34, 35

29 C.F.R. § 860.104 (1986) 2, 5, 34

29 C.F.R. § 1625.7 ..... 1, 6, 11, 36, 42

MISCELLANEOUS

110 Cong. Rec. 13088 (1964) 28

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 603 (1967) 1, 33

Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986) 6

AMERICAN HERITAGE DICTIONARY (4th ed. 2000) 26

Alfred Blumrosen, *et al.*, *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943 (1998) 40

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) 1, 2, 3, 4

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986) 6

H.R. Rep. No. 90-805, 90th Cong., 1st Sess. (1967) 3

Brett Ira Johnson, *Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303 35

TABLE OF AUTHORITIES – Continued

Page

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Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1874 (1986) 6

Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, 104 Stat. 978 (1990) 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 255 F.3d 1322. The opinions of the district court (Pet. App. 19a-30a) are unreported.

JURISDICTION

The court of appeals entered its judgment on July 5, 2001 (Pet. App. 1a). The petition for a writ of certiorari was filed on October 3, 2001, and granted on December 3, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The relevant portions of the original Age Discrimination in Employment Act of 1967, § 4(a) & (f), 81 Stat. 603 (ADEA), are reprinted at App., *infra*, 1a. The relevant portions of the ADEA, as amended, 29 U.S.C. §§ 621-623, 625-626, 628 & 630, are reprinted at App., *infra*, 3a. The relevant portions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2, are reprinted at App., *infra*, 18a. The relevant portions of the Equal Pay Act of 1963, as amended, 29 U.S.C. § 206(d)(1), are reprinted at App., *infra*, 23a. The Equal Employment Opportunity Commission's relevant interpretation of the ADEA, 29 C.F.R. § 1625.7, is reprinted at App., *infra*, 24a. The Secretary of Labor's relevant 1968 interpretation of

the ADEA, 29 C.F.R. § 860.103, 29 C.F.R. § 860.104 (1986), is reprinted at App., *infra*, 26a.

STATEMENT

The petitioners (the Adams Group) are 117 older former employees of respondent Florida Power Corporation that the company fired during a corporate downsizing. More than 70% of the employees selected for termination were at least 40 years old, and the Adams Group has alleged that the downsizing had a disproportionate impact on the older workers within the company. The question presented in this case is whether—and, if so, under what conditions—older workers may use a disparate impact method of proving age discrimination under the ADEA.

A. The ADEA: Its Language, Legislative History and pre-*Hazen* Caselaw

Correct construction of the ADEA is aided by an understanding of its language, legislative history, and caselaw arising before *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)—as well as by the amendments to the ADEA imported through the Older Workers Benefit Protection Act of 1990 (OWBPA).

When Congress passed Title VII of the Civil Rights Act of 1964 it also commissioned a study by the Secretary of Labor on age discrimination in the workplace. Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964). In his 1965 report to Congress, the Secretary

described arbitrary discrimination based on mistaken assumptions about the effect of age on workers' ability to do their jobs. J.A. 385-90 (U.S. Department of Labor, Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 pp. 14-17 (1965)). He concluded that "[t]o eliminate discrimination in the employment of older workers, it will be necessary not only to deal with overt acts of discrimination, but also to adjust those present employment practices which quite unintentionally lead to age limits in hiring." J.A. 406

Congress subsequently recognized that "older workers find themselves disadvantaged in their efforts to retain or regain employment, [and] that arbitrary age limits and certain other practices may work to the disadvantage of older persons." H.R. Rep. No. 90-805, 90th Cong., 1st Sess. (1967). The ADEA was then enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995).

"[T]he ADEA broadly prohibits arbitrary discrimination in the workplace based on age." *Lorillard v. Pons*, 434 U.S. 575, 577 (1978); *see also EEOC v. Wyoming*, 460 U.S. 226, 231 (1983). The express prohibitions of the ADEA make it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age," 29 U.S.C. § 623(a)(1), or "to limit, segregate, or classify * * * employees in any way

which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age," 29 U.S.C. § 623(a)(2).

As the Court has acknowledged, there "are important similarities between" the ADEA and Title VII of the Civil Rights Act, "both in their aims—the elimination of discrimination from the workplace—and in their substantive prohibitions. In fact, the prohibitions of the ADEA were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. at 584; *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979) ("the ADEA and Title VII share a common purpose, the elimination of discrimination in the workplace").[1] A noted statutory difference between the ADEA and Title VII, however, is that an action adverse to an employee "because of age," and thus "otherwise prohibited" by the ADEA, is nonetheless lawful "where the differentiation is based on reasonable factors other than

---

[1] The prohibitions of Title VII make it unlawful

> for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

age." 29 U.S.C. § 623(f)(1). Title VII does not have this express exception.

In 1971, the Court issued its opinion in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), to address "arbitrary" and other discrimination that could not be detected and proven in the same way as invidious discrimination, and permitted claims to proceed on the basis of a disparate impact model of proof. As an exception to disparate impact liability, the Court held that an employer defending an otherwise adequate disparate impact case would prevail if it established that its challenged practice was based on a "business necessity." Following *Griggs*, multiple courts applied, or assumed application of, the Title VII disparate impact model in ADEA cases: *See, e.g., Monroe v. United Air Lines*, 736 F.2d 394, 404 n.3 (CA7 1984), *cert. denied*, 105 S. Ct. 983 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (CA8 1983); *Allison v. Western Union Telephone Co.*, 680 F.2d 1318, 1321-22 (CA11 1982); *Douglas v. Anderson*, 656 F.2d 528, 531 n.1 (CA9 1981); *Geller v. Markham*, 635 F.2d 1027 (CA2 1980), *cert. denied*, 451 U.S. 945 (1981); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (CA6 1975); *United Independent Flight Officers v. United Air Lines*, 572 F. Supp. 1494, 1505 (N.D.Ill. 1983). The Department of Labor guidelines issued contemporaneously with the ADEA also suggested that age discrimination claims could be based on facially age-neutral employment actions. 29 C.F.R. § 860.103(f)(1) & (2) (1986), 29 C.F.R. § 860.104(b). (Currently, and for the past 19 years, the EEOC interpretive guidelines have indicated that the "reasonable factors" defense in the ADEA works with the business necessity defense in a disparate impact analysis. The guidelines provide that an employer may

raise the "reasonable factors" defense to justify employment practices that "have an adverse impact on individuals within the protected age group." 29 C.F.R. § 1625.7(d)).

In 1989, the Court issued an opinion in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that arguably reduced the burden of a disparate impact defendant in Title VII litigation. *Wards Cove* said nothing, however, to suggest that disparate impact for Title VII or the ADEA did not *exist*, and courts continued to assume that disparate impact applied to the ADEA. Steven Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 258-75 (1990) (discussing prevailing view in 1990). Partially in response to *Wards Cove*, Congress restored the pre-*Wards Cove* version of the disparate impact theory in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(k)(1)(A). Congress did not make any similar amendment to the ADEA. As Judge Posner recognized as late as 1992, however, "the weight of authority * * * [was] that disparate impact [was] a viable doctrine under the age discrimination law." *Finnegan v. Trans World Airlines*, 967 F.2d 1161, 1163 (CA7 1992).

Congress amended the ADEA several times since *Griggs*. *See, e.g.*, Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (1986); Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, § 9201, 100 Stat. 1874, 1973-75 (1986); Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9201(b), 100 Stat. 82, 171 (1986); Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802, 98 Stat. 1792 (1984). Congress has never

acted, however, to restrict or otherwise undermine disparate impact analysis in ADEA cases.[2] *EEOC v. Governor Mifflin School District*, 623 F. Supp. 734, 740-41 (E.D.Pa. 1985). To the contrary, the 1990 Congress (post-*Wards Cove*) amended the ADEA by adding the OWBPA and requiring that employers provide employees with *statistical information* regarding the ages of co-workers offered severance pay (and of those co-workers who were not let go) so that employees could meaningfully determine whether to waive any rights to bring age discrimination claims. 29 U.S.C. § 626(f)(1)(H)(ii), Pub. L. No. 101-433, 104 Stat. 978 (1990).

In 1993, the Court issued its opinion in *Hazen Paper* and suggested in *dicta* that the disparate impact method of proving discrimination available to Title VII plaintiffs might not be available to ADEA plaintiffs. Neither the majority's opinion, nor the concurrence, indicated that disparate impact was wholly unavailable to ADEA plaintiffs—only that Title VII's version of it might not be.

B. Proceedings Below

The Adams Group consists of 117 former employees of Florida Power Corporation who were at least 40 years old when the company fired them as part of a corporate downsizing that began in 1992 and concluded in 1996. Over 70% of the terminated personnel were over the age

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[2] "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. at 580.

of 40, and the Adams Group has alleged that the downsizing disproportionately selected the older workers within the company for elimination. Pet. App. 2a; J.A. 24-25, 298-304; Doc. 67 p. 4.[3] Invoking jurisdiction under 29 U.S.C. § 626(c) and 28 U.S.C. § 1331, members of the Adams Group filed a complaint in the Middle District of Florida and alleged that Florida Power[4] had violated the ADEA in its downsizing activities by (1) willfully discriminating against senior employees on the basis of their age, and (2) disparately impacting older employees, a result that could have been avoided by other means sufficient to satisfy Florida Power's business needs. Pet. App. 2a-3a; J.A. 26-27.[5] The company denied any violation of the ADEA and asserted that it had legitimate, non-discriminatory reasons for firing the Adams Group. Doc. 218 pp. 11-16. Specifically, Florida Power has asserted that it "underwent a series of reorganizations," not to trim the workplace of older workers, but "[t]o prepare for [the] competition" that utility deregulation would bring it within the State of Florida. Brief in Opp. 2.

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[3] Given the procedural posture of the case, the allegations and evidence favoring the Adams Group are assumed true for purposes of this brief. *See* Pet. App. 2a n.1, and *id.* at 3a-4a.

[4] The complaint also names Florida Power's parent, Florida Progress Corporation; for simplicity's sake this brief refers to the respondents collectively as Florida Power.

[5] Since these allegations are the same for each of the members of the Adams Group, reference is simply made to the first instance of ADEA allegations in the complaint (*i.e.*, Wanda Adams), as well as to the first instance of Florida Power's denial of those allegations.

The district court conditionally certified a class in 1996, and potential class members were notified of their right to opt-in to the suit. Pet. App. 3a; J.A. 7-9. The remaining members of the Adams Group then joined the case. Doc. 215 p. 11 n.7. Two years later, Florida Power moved to decertify the class based upon a lack of commonality.[6] Doc. 221; Doc. 229. In opposition, the Adams Group argued that higher-level management at Florida Power had a "single policy" to reduce older workers in the work force—an argument based on the testimony of Florida Power executives as well as the testimony of members of the Adams Group who had access to confidential management documents and meetings.[7] J.A. 297-304 and accompanying exhibits.

The district court decertified the class based upon its determination that (1) disparate impact analysis was not

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[6] And, in its Opposition to Plaintiffs' Petition for Permission to Appeal to the Eleventh Circuit (J.A. 327-30), Florida Power argued that it used "no standard method" in its downsizing, that reductions in personnel "resulted from a number of different factors," that "different decision makers" in its different departments formulated and implemented reductions (*ibid.*), and that evaluations and rankings of employees played a part in the downsizing process (J.A. 348 ex. 2 ¶¶24-30; Doc. 229 pp. 9-12, 21-22 and accompanying affidavits).

[7] For example, the testimony referred to a "statistical evaluation" Florida Power used to "correlate age, years of service, cost of benefits and liabilities at the time of retirement"; and statements a Florida Power vice-president allegedly made that the company needed to "get rid of older people" who "had nothing to contribute to the corporation * * *." J.A. 300-01 and accompanying exhibits.

available under the ADEA, and (2) the class members could not be deemed similarly situated, as required under 29 U.S.C. § 216(b) for certification, unless their claims could be premised on a theory of disparate impact. Pet. App. 3a. The judge certified the question of the existence of ADEA disparate impact analysis to the Eleventh Circuit under 28 U.S.C. § 1292(b) because the question presented a controlling issue of law in the case and, since the circuits were "remarkably divided on the issue" (Pet. App. 24a), he believed there were substantial grounds for disagreement over his decision (*id.* at 2a).

The Eleventh Circuit accepted the case and, in an opinion joined by one member of the panel, affirmed. *Id.* at 8a. The court based its decision on four grounds. First, the ADEA's exception for "reasonable factors other than age" does not exist in Title VII. *Id.* at 6a. Second, the court determined that this ADEA exception is similar to an exception in the remedial provisions of the Equal Pay Act (EPA), 29 U.S.C. § 206(d)(1)(iv), and that this Court had interpreted the EPA's exception to preclude disparate impact claims. Pet. App. 7a. Third, the court of appeals found that the legislative history of the ADEA was unlike the legislative history of Title VII because the Secretary of Labor's report preceding enactment of the ADEA "recommended that Congress ban arbitrary discrimination, such as disparate treatment based on stereotypical perceptions of the elderly, but that factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Ibid.* Finally, the court stated that the decision in *Hazen Paper* suggested that no disparate impact claim could be brought under the ADEA.

In a special concurrence, Judge Barkett disagreed with the panel's analysis and concluded that "disparate impact can be pled and proved in an appropriate case under the ADEA, and that it cannot be said as a matter of law that this theory can never be used in an age discrimination case.[8] She pointed to the similarities of the policies behind Title VII and the ADEA and argued that the ADEA's exception for "reasonable factors other than age" added nothing beyond what the Court had required in *Griggs* for Title VII plaintiffs, *i.e.*, that the challenged practice is either "not founded on 'business necessity,' or lacks 'a manifest relationship to the employment.' " Pet. App. 11a-12a (quoting *Griggs*, 401 U.S. at 431).

Noting that the EEOC interpretive guidelines, 29 C.F.R. § 1625.7(d), are entitled to judicial deference,[9] the concurrence found that the guidelines suggest the ADEA's reasonable factors defense works in tandem with

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[8] Judge Barkett would have affirmed based upon her determination that the Adams Group had not yet sufficiently alleged disparate impact and that the court of appeals was thus making a "pronouncement in the abstract." Pet. App. 9a. Without reaching the sufficiency of the disparate impact allegations, the majority retorted that Judge Barkett's position was "inconsistent with the posture of the case. * * * Indeed, because the district court certified only the question of law to us, a 'pronouncement in the abstract' is required." *Id.* at 2a n.1.

[9] Pet. App. 12a n.4 (citing *Edwards v. Shalala*, 64 F.3d 601, 606 (CA11 1995) (" 'An agency's interpretation of an ambiguous provision within a statute it is authorized to implement is entitled to judicial deference.' ") (quoting *Jones v. Runyon*, 32 F.3d 1454, 1457-58 (CA10 1994)); *Pauley v. BethEnergy Mines*, 501 U.S. 680, 696-98 (1991); *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837, 866 (1984)).

Title VII's business necessity defense. Pet. App. 12a. Additionally, the concurrence observed that Congress had amended the ADEA several times after federal courts had held that disparate impact was available to ADEA plaintiffs, yet Congress had never sought to exclude disparate impact claims. *Id.* at 13a.

With respect to the asserted similarity between the exceptions found in the EPA and the ADEA, the concurrence made two distinctions: First, the question of disparate impact concerns the substantive provisions of the ADEA, which are similar to the substantive provisions of Title VII, not the remedial provisions of the EPA. *Id.* at 14a. Second, the EPA exception permits pay discrepancies for "any other factor other than sex," 29 U.S.C. § 206(d)(1)(iv), and thus requires only a neutral explanation for pay disparity to ensure that employers can only be liable for "intentional purposeful discrimination." Pet. App. 14a. The ADEA exception requires, however, that the employer take the additional step of showing the *reasonableness* of the neutral factor. *Id.* at 14a-15a.

Finally, with respect to the Secretary of Labor's 1965 report preceding enactment of the ADEA, the concurrence acknowledged that the "report differentiated between what it termed 'arbitrary discrimination' based on age and problems resulting from factors that 'affect older workers more strongly, as a group, than they do younger employees.' " *Id.* at 18a. Unlike the majority, however, the concurrence did not conclude that this differentiation precluded disparate impact claims. "The very question disparate impact analysis seeks to answer is whether the challenged policy that disproportionately

impacts older workers is derived from a reasonable business judgment or whether the policy is the result of arbitrary discrimination." *Ibid.*

SUMMARY OF ARGUMENT

Some employment practices adopted without a deliberately discriminatory motive may, in operation, be functionally equivalent to intentional discrimination. The disparate impact method of proof allows plaintiffs to show, inferentially, that such discrimination has occurred. The language of the ADEA both expressly and implicitly permits plaintiffs to use a disparate impact method to establish that discrimination has occurred.

Expressly, the ADEA prohibits an employer from *limiting or classifying* its employees in any way that would adversely *affect* any individual's status as an employee because of such individual's age. The prohibition does not mention the word "discriminate," and the Court has already construed identical language to authorize plaintiffs to use the disparate impact method.

Implicitly, the ADEA recognizes unintentional discrimination because it provides an affirmative defense if an employer has taken an "otherwise prohibited" action differentiating between younger and older workers, and excuses the action if the differentiation was based on "reasonable factors other than age." Thus, if the differentiation were based on age-neutral factors there would be no defense for the prohibited action unless the factors were also reasonable. If the ADEA only prohibited *intentional* discrimination, the defense could never apply

because the differentiation would *always* be based on age. To give effect to the actual words of the ADEA, there must be a cause of action for unintentional discrimination, and proof of disparate impact fills the evidentiary void to establish such discrimination where there is an unreasonable, albeit age-neutral, basis for differentiation.

Title VII has incorporated a defense from the Equal Pay Act that—with one critical difference—is substantially identical to the "reasonable factors other than age" defense in the ADEA. The Title VII defense applies to claims of sex-based wage discrimination where the differential is based on any "factor other than sex." The Court has held that the defense works with Title VII's prohibitions against sex discrimination—which are identical to the ADEA's prohibitions against age discrimination—where plaintiffs seek to prove sex discrimination claims based on disparate impact. The defense, which lacks the ADEA qualifier "reasonable," precludes such claims from succeeding, provided that the asser ed "factors" are bona fide and sex-neutral. The standard for age-neutral actions having a disparate impact on older workers must logically be higher.

The administrative agencies charged with interpreting the ADEA have long interpreted the Act to require considerably more than mere facial age neutrality, and the current regulations of the EEOC expressly address employment practices that have an "adverse impact on individuals within the protected age group." Until *Hazen Paper*, courts had consistently held or assumed that disparate impact was an available means of proof. Congress has never acted, however, to stop older workers from using the disparate impact method in ADEA cases.

Instead, Congress passed the OWBPA in 1990 and required employers to provide statistics that employees terminated in corporate downsizings could use to assess whether to litigate claims under the ADEA or accept termination packages that waived any right to bring such claims. Since employees terminated in downsizings—unlike employees terminated on an individual basis—have no reason to suspect that the termination is directed toward them personally, and terminated workers cannot make a prima facie case of disparate treatment based on statistics alone, the statistical requirement reflects a Congressional endorsement of disparate impact claims. Given that Title VII itself does not require employers to provide such statistics, it would be peculiar that downsized workers covered by the ADEA—the only workers provided a statistical tool permitting them to assess whether they have a disparate impact case—were not allowed to use their statistics for disparate impact claims.

The meaning of "reasonable factors" under the ADEA may be the most challenging item for the Court's consideration in this case. Given the ambiguity of the term, however, the petitioners suggest that the Court should defer to the EEOC's interpretation. Alternatively, the Court may find disparate impact plaintiffs are in the same substantive position that Title VII plaintiffs were in between *Wards Cove* and the enactment of the Civil Rights Act of 1991. Or, the Court may adopt a different position in keeping with the language of the ADEA. In any event, the burden of proving that an employer's actions differentiating between younger and older workers were "based on reasonable factors" should be with the employer, as it is with other affirmative defenses.

Here, the Adams Group contends that Florida Power's downsizing disproportionately selected the older workers within the company for termination. Florida Power responds that it based its decision to downsize on a belief that it should prepare for deregulation of the utility industry in Florida, which was to occur in the foreseeable future. If this case proceeds to trial on the disparate impact theory, the Adams Group should prevail if the evidence shows Florida Power's downsizing disproportionately terminated the company's older workers and that either (a) age truly was a factor in the company's decision to downsize; or (b) the decision to downsize was not based on reasonable factors. The first of these "reasonable factors" considerations might be established by showing that the downsizing actually increased the company's size, but substantially reduced the median age in the company's workforce. Depending on how the Court construes the term "reasonable factors," the second might be shown by evidence that (for example) a person knowledgeable in Florida's utility industry at the time of downsizing would have known there was no reason to prepare for deregulation because it was abundantly clear that deregulation was not going to occur within the State anytime in the foreseeable future.

ARGUMENT

I. THE ADEA PERMITS OLDER WORKERS TO PROVE AGE DISCRIMINATION THROUGH DISPARATE IMPACT

Because "employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination," *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 987 (1988), the disparate impact model exists to detect inferentially those "decisions that reflect 'inaccurate and stigmatizing stereotypes,' " *EEOC v. Francis W. Parker School*, 41 F.3d 1073, 1080-81 (CA7 1994) (Cudahy, J., dissenting) (quoting *Hazen Paper*, 507 U.S. at 604). Some arguments regarding whether disparate impact is an available means of proof under the ADEA focus on legislative history, others on policy, and still others on regulations enacted contemporaneously with, and subsequently to, the passage of the Act. Before addressing those extra-textual arguments, however, an examination of the written language of the Act is appropriate. *See Duncan v. Walker*, 530 U.S. 167, 121 S. Ct. 2120, 2124 (2001) ("We begin, as always, with the language of the statute."); *see also Carter v. U.S.*, 530 U.S. 255, 271 (2000) ("In analyzing a statute, we begin by examining the text, not by 'psychoanalyzing those who enacted it.' " (citing *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992), and quoting *Bank One Chicago v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring in part and concurring in judgment)).

A. Giving Effect to the ADEA's Written Words

1. The ADEA expressly permits claims based on disparate impact.

The most conventional argument that disparate impact is available under the ADEA rests on the Act's provision that an employer may not "limit, segregate, or classify his employees in any way which would * * * adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This prohibition does not use the word "discriminate," but instead "imposes liability for employment practices that 'adversely' affect an employee's 'status', and nowhere includes an intent requirement." Michael C. Sloan, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 517 (1995); *see generally* Marla Ziegler, Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 MINN. L. REV. 1038 (1984) (the ADEA expressly permits claims based on disparate impact). In short, by prohibiting practices that "adversely affect" older employees, the ADEA prohibits decisions having an "adverse impact" on older employees. Since identical language under Title VII, 42 U.S.C. § 2000e-2(a), supports recognizing disparate impact claims, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 137 n.13 (1976), the language under the ADEA supports disparate impact claims as well.

In a note cited in the *Hazen Paper* concurrence, 507 U.S. at 618 (Kennedy, J., concurring), a law student made a largely grammar-based argument to the contrary:

> [S]ection 4(a)(2) [of the ADEA, 29 U.S.C. § 623(a)(2)] could be read to authorize disparate impact claims. * * * There are two possible interpretations of section 4(a)(2), with the correct interpretation depending upon what the clause "because of age" modifies. *If "because of age" modifies the verb "affect," the section prohibits employers from classifying employees in a manner that adversely affects their employment status because of their age. Such an interpretation could be seen as authorizing disparate impact claims.* Alternatively, the "because of age" clause could be read to modify "limit, segregate, or classify," in which case the provision prohibits classifying employees because of their age, so as to adversely affect their employment status. This interpretation authorizes only claims of disparate *treatment*.

> There are a number of indications that this latter interpretation is the proper one. *First, only the latter construction is grammatically correct.*

Pamela S. Krop, Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 STAN. L. REV. 837, 842-43 (1982) (emphasis added) (footnotes omitted).[10] The note

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[10] The note made an additional argument working from the premise that section 4(a)(1) only applied to intentional discrimination in light of its "because of age" language and that—since section 4(a)(1) was a parallel provision—it would be incongruous to construe the provisions differently. Krop, 34 STAN. L. REV. at 843. The lack of incongruity is better read as a lack of redundancy, and, as discussed below, the "because of age" language does not foreclose disparate impact. The note also made a policy argument that "it would have been anomalous for Congress to authorize disparate impact in section 4(a)(2)," which does not apply to job applicants, because applicants were the "most likely to benefit from such a claim." *Ibid.* Speculations about policy cannot trump the written words

explained its assertion that only the proposed construction was "grammatically correct" as follows:

> The comma preceding the "because of age" clause suggests that Congress intended the provision to modify the clause setting forth the prohibited conduct. Thus, the sentence would prohibit an employer from classifying an employee because of such individual's age in any way that would deprive him of employment opportunities or otherwise adversely affect his status as an employee. This construction clearly addresses only disparate treatment. Any other interpretation renders the comma superfluous.

Id. at 843 n.27. Accordingly, the note concludes, section 4(a)(2) should be read to "prohibit an employer from classifying an employee because of such individual's age in any way that would deprive him of employment opportunities or otherwise adversely affect his status as an employee."[11] *Id.* at 843. This interpretation might seem reasonable, but that is *not* what the statute says.

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of the Act, however. *Great-West Life & Annuity Ins. Co. v. Knudson*, ___ U.S. ___, 2002 WL 15399 (January 8, 2002) ("It is, however, not our job to find reasons for what Congress has plainly done; and it is our job to avoid rendering what Congress has plainly done (here, limit the available relief) devoid of reason and effect"). As discussed below, Congress has plainly *not* done what the writer proposes.

[11] The court in *Mullin v. Raytheon Co.*, 171 F.3d 710, 710 (CA1 1999), and a special opinion in *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (CA3 1995) (opinion of Greenberg, J.), applied this grammatical argument, and Florida Power cited the argument in its brief in opposition to certiorari. Brief in Opp. 13.

The irony of the "grammatical" argument becomes startlingly clear once the argument is applied to the written statute, rather than the note's reconstructed version of the law. The statute provides:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee, because of such *individual's* age.

29 U.S.C. § 623(4)(f)(1) (emphasis added). So, to apply the reading that the note calls for to the *actual* statute would result in the following, quite incongruous, text:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* [because of such *individual's* age] in any way which would deprive or tend to deprive any *individual* of employment opportunities or otherwise adversely affect his status as an employee.

The lack of linguistic agreement is obvious, and the reading does violence to both logic and language. The far more reasonable reading is:

> It shall be unlawful for an employer * * * to limit, segregate, or classify his *employees* in any way which would deprive or tend to deprive any *individual* of employment opportunities [because of such *individual's* age] or otherwise adversely affect his status as an employee, because of such *individual's* age.

The note actually acknowledged this construction, observing that "[t]he 'because of age' clause could also be seen as modifying the entire phrase 'deprive or tend to

deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.' " Krop, 34 STAN. L. REV. at 843 n.26. However, the author rejected this reading because then the "entire phrase amounts to no more than saying 'adversely affect.' " *Ibid.* Perhaps so, but that is by far the more grammatical—and more plausible—reading of section 4(a)(2).[12] Once beyond the hurdle that "because of such individual's age" refers to the concept of "affect," even the adverse writer acknowledged that "[s]uch an interpretation could be seen as authorizing disparate impact claims." *Id.* at 842-43.

2. The ADEA's prohibitions and related affirmative defenses strongly indicate that disparate impact is an available means of proving age discrimination.

"It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' " *TRW Inc. v. Andrews*, 122 S. Ct. 441, 449 (2001) (quoting *Duncan*, 533 U.S. at ___, 121 S. Ct. at 2125 (citations omitted)). And

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[12] There should not be much difficulty in accepting this construction, given the phrase "or *otherwise* adversely affect." The phrase is similar to the language in *parallel* section 4(a)(1) "or *otherwise* discriminate." Terms like "or otherwise" at the end of these sorts of serial listings reflect a catchall phrase that follows specific examples. *See, infra*, n.18 (discussing "catch-all" phrase "any other factor other than" located at end of serial listing (quoting *Corning Glass Works v. Brennan*, 417 U.S. 188, 196 (1974)).

"every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Washington Market Co. v. Hoffman*, 11 Otto (101 U.S.) 112, 116 (1879). Of course, "[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (citing *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context")); *Davis v. Michigan Department of Treasury*, 489 U.S. 803, 809 (1989) ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")).

a. The terms "because of" and "based on" do not mean the same thing in the ADEA.

The ADEA expressly prohibits an employer from taking adverse actions against an older worker "*because of* such individual's age." The same section then provides, however, that an employer may take these "otherwise prohibited" actions if:

(1) age is a legitimate qualification for the job;

(2) "the differentiation is *based on* reasonable factors other than age;" or

(3) the work is done in a foreign country with laws in conflict with the ADEA's prohibitions.

29 U.S.C. § 623(f)(1) (emphasis added). The first and the last of the defenses clearly operate from their shared

premise that "otherwise prohibited" age discrimination has occurred. The middle defense—reasonable factors other than age—operates from the same, shared premise, but its operation is less obvious. It provides that employers may discriminate against older workers "because of age" if the differentiation between older and younger workers is "based on reasonable factors *other than* age." Since the defense does not permit employers to differentiate based on reasonable factors *in addition to* age,[13] the reasonable factors that employers base their actions upon must not include age. Superficially, at least, the defense may seem redundant to the prohibition, or even nonsensical, but the canons of construction compel another reading—one that gives effect to Congress's words.

If the terms "because of" and "based on" carried the same meaning, the "reasonable factors" defense would have none because violation of the prohibition would *expressly* preclude the defense's application: The ADEA would prohibit an employer from discriminating against

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[13] The "in addition to" language is just an example. Had the phrase not been "other than age," then age arguably might have been a permissible, concurrent consideration if Congress had said "as well as age," "beyond age," "besides age," or "regardless of age." But Congress chose to say "other than age," and the meaning is exclusionary. That meaning is particularly clear since the first defense—which permits age to be a basis to discriminate in employment—and the second defense—which permits factors "other than age" to be a basis to discriminate in employment—operate as complimentary counterparts, and because there is no reason to believe that Congress intended to permit discriminatory employment actions that were *consciously* age-based, other than those clearly set forth in the ADEA.

an older worker *because of such individual's age* except where the differentiation was *not because of age* and was because of reasonable factors; or, from discriminating against an older worker *based on the employee's age* except where the differentiation was *not based on age* and was based on reasonable factors. Satisfaction of the premise for triggering the defense (the occurrence of a prohibited action) would inherently defeat the defense's application. Thus, to give effect to the reasonable factors defense, the terms "because of" and "based on" cannot carry the same meaning.

There is, as well, a textual reason why the terms cannot carry the same meaning in the ADEA. As this Court said long ago, "[i]t is a familiar rule in the interpretation of written instruments and statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.' " *Neal v. Clark*, 5 Otto (95 U.S.) 704, 705 (1877). More recently, the Court described the "well settled" rule that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Duncan v. Walker*, 530 U.S. ___, 121 S. Ct. at 2125 (internal quotation marks omitted) (quoting *Bates v. United States*, 522 U.S. 23, 29-30 (1997) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))).

Given the proximity and textual interrelationship of the terms "because of" and "based on," they cannot carry the same meaning in the ADEA. Congress presumably acted intentionally and purposefully in including each term and excluding the other where the terms were used.

Just as interrelated *identical* words used in close proximity should be construed to have the same meaning, interrelated *different* words used in close proximity should be construed to have different meanings. *Cf. C.I.R. v. Lundy*, 516 U.S. 235, 250 (1996) ("The interrelationship and close proximity of these provisions of the statute presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." (internal quotation marks omitted) (quoting *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (quoting *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)))).

Acknowledging that the terms "because of" and "based on" possess different meanings in the ADEA requires a determination of what those meanings should be. Etymologically, "based on" and "because of" are quite different: "based on" requires a principal component or foundation—a requirement that would appear to require intent where, as here, the term is combined with a reliance on "reasonable factors." The term "because of," in contrast, reflects a cause and effect relationship that can subsume both intentional and unintentional conduct.[14] For example, one may be late for work *because of*

[14] The term "because of" comes from the Middle English *bi cause of*. AMERICAN HERITAGE DICTIONARY (4th ed. 2000). The primary meanings of "cause" are "1a. The producer of an effect, result, or consequence. b. The one, such as a person, event, or condition, that is responsible for an action or result." *Ibid.* The secondary meaning of "cause" is "2. A basis for an action or response; a reason." *Ibid.* The term can thus be used as part of an explanation for "an effect, result, or consequence," and as the explanation for action taken with a conscious "basis" or "reason."

an accident, and there would be no intent for tardiness. It would be unusual, however, to say that one is late for work *based on* an accident; an action *based on* something ordinarily involves intent. *Cf. United Food and Commercial Workers Union v. Brown Group*, 517 U.S. 544, 550 (1996) ("the more natural reading of the statute's text, which would give effect to all of its provisions, always prevails over a mere suggestion to disregard or ignore duly enacted law as legislative oversight.").

b. The reasonable factors requirement

The ADEA's reasonable factors defense permits an employer to discriminate because of age if the differentiation between older and younger workers is not *based on* age. Giving meaning to the defense suggests that the prohibition applies to both intentional and unintentional discrimination, and thus supports a reading of the ADEA that permits plaintiffs to use the disparate impact method of proof. Perhaps, however, the clearest way of seeing that disparate impact applies to the ADEA is not by understanding what the defense permits—but what it leaves prohibited subject to the other ADEA defenses.

The reasonable factors defense applies only if the factors upon which an employer based its discriminatory action were both (a) not age and (b) "reasonable." The necessary corollary to this defense is that it does not apply if the employer based its action on factors that were *not* "reasonable" even if the factors were "other

than age."[15] There is, accordingly, the statutory potential for liability if the employer based its actions upon unreasonable age-neutral factors.

The analysis cannot stop there, of course, or else employers could be liable under the ADEA *merely* for taking adverse actions against employees based on unreasonable factors—and *this* would ignore the statutory requirement that the adverse action be "because of" age. In other words, the mere fact that an older worker loses his job based on an unreasonable factor fails to prove that the termination was "because of age." As the Court observed in *Hazen Paper*, an employer may fire an employee because of race, but this would hardly be a matter of *age* discrimination. *Hazen Paper*, 507 U.S. at 612. Disparate impact fills the evidentiary void.[16] *See Watson*, 487 U.S. at 987 ("the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination"); *Connecticut v. Teal*, 457 U.S. 440, 458-59 (1982) (Powell, J., dissenting) ("In disparate-impact cases,

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[15] The meaning of "reasonable factors" under the ADEA is discussed below in Section II of the Argument.

[16] Disparate treatment may, as the Court said, "capture[ ] the essence of what Congress sought to prohibit in the ADEA," *Hazen*, 507 U.S. at 610, but—contrary to the analysis of *post-Hazen* courts—this does not mean that disparate impact is inapplicable as a means of *proving* discrimination. *Cf. International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977) ("Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.") (citing 110 Cong. Rec. 13088 (1964))).

by contrast, the plaintiff seeks to carry his burden of proof by way of *inference*—by showing that an employer's selection process results in the rejection of a disproportionate number of members of a protected group to which he belongs."); *EEOC v. Francis W. Parker School*, 41 F.3d at 1080-81 (Cudahy, J., dissenting) ("[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes.' This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw.") (quoting *Hazen Paper*, 507 U.S. at 604).

B. The Bennett Amendment to Title VII

1. The True Meaning of *Gunther*

The Court's analysis in *County of Washington v. Gunther*, 452 U.S. 161 (1981), also suggests that disparate impact is available under the ADEA. In *Gunther*, female prison guards sued under Title VII alleging pay discrimination. Their allegations would not have stated claims under the Equal Pay Act (EPA) because their job duties were not "equal" to those of male prison guards—a requirement for EPA liability.[17] *Id.* at 166. The defendant argued that the Bennett Amendment, which provides that there is no action under Title VII for conduct "authorized" by the EPA, 42 U.S.C. § 2000e-2(h) (1994),

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[17] They could not even attempt to bring an EPA claim because—as municipal employees—the factual basis for their allegations preceded the effective date of the Act. *Gunther*, 452 U.S. 164 n.3.

precluded Title VII liability. The Court rejected the argument on the rationale that conduct was not authorized merely by not being prohibited; that conduct was only *authorized* if a statutory defense permitted it. 452 U.S. at 168-69. The Bennett Amendment, the Court held, did nothing more than incorporate the EPA's defenses into Title VII. *Id.* at 169-70.

The dissent countered that this reading of the Amendment rendered it meaningless because (a) Title VII prohibited intentional sex discrimination; and (b) the EPA included a defense that authorized pay differences based on any "factor other than sex." *Id.* at 199-200 (Rehnquist, J., dissenting). Thus, the dissent argued, if sex motivated the pay difference, there could be no possible application of the defense. *Ibid.* The majority responded that the incorporation of the "factor other than sex" defense into Title VII was not rendered meaningless because it would apply to disparate impact cases. *Id.* at 170-71. Without elaboration, the Court explained that the employer could avoid liability by establishing the sex neutrality and bona fides of the factors. *Ibid.*

The *prohibitions* of the ADEA were taken directly from the prohibitions of Title VII. Apart from the critical word "reasonable," the "factor other than sex" defense incorporated into Title VII by the Bennett Amendment is substantially similar to the "reasonable factors other than age" defense in the ADEA.[18] The Court's analysis in

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[18] Its interaction with its co-listed defenses is also different: given its placement at the end of the series, and its preceding phrase "any other" before "factor other than," it serves as a general "catch-all" provision, *Corning Glass Works*, 417 U.S. at 196, to the EPA and, by extension, to Title VII.

Gunther should thus apply to permit disparate impact under the ADEA. As one commentator said:

> *Gunther* is virtually controlling on this issue [of disparate impact under the ADEA]. Indeed, it raises and answers an identical question cast in a different statutory scheme. The similar "factor other than . . . " defense was given meaning by the *Gunther* court based on the assumption that the substantive prohibitions to which it applied imposed liability premised on impact. If that is true in this complex intersection of Title VII and the Equal Pay Act, it would seem equally true under the ADEA, particularly given the injunction that resolutions of Title VII language will be given similar construction under the ADEA.

Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That Is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 833-35 (1997).

Ironically, some courts have used *Gunther* to argue that disparate impact is not available under the ADEA. *See, e.g., Adams*, 255 F.3d at 1325; *Mullin*, 164 F.3d at 702; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (CA10 1996), *cert. denied*, 517 U.S. 1245 (1996). They overlook that the reasonable factors defense is an affirmative defense working from the premise that a violation has already occurred. Having made this error, they suggest that the prohibition and the reasonable factors provision can only be read together as a means of making clear that the ADEA prohibits disparate treatment and permits disparate impact.

2. Yes, the Reasonable Factors Defense is an Affirmative Defense.

In its Brief in Opposition, Florida Power argued that the reasonable factors defense was not a defense at all, but merely a definitional provision:

> Petitioners similarly err in contending that the "reasonable factors other than age" provision in Section 623(f)(1) must be construed as an affirmative defense against disparate impact claims. Pet. 20-21. This provision is better understood to be a "definitional provision" that "delineates which employment practices are illegal and thereby prohibited and which are not," *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (interpreting Title VII), just as this Court held that the "bona fide employee benefit plan" provision in an earlier version of Section 623(f)(2) was a definitional provision and not an affirmative defense. *See Ohio Pub. Employee Retirement Sys. v. Betts*, 492 U.S. 158, 181 (1989).

Brief in Opp. 13. There are several flaws with this argument. First, and most importantly, defenses in Section 623(f)(1) are preceded by the words "it shall not be unlawful for an employer * * * to take any action *otherwise prohibited* under [the preceding subsections] of this section where * * * ." The most reasonable construction of this language is that it only applies where there has been a violation of the ADEA's prohibitions.

Second, the bona fide employee benefit plan provision found in an earlier version of Section 623(f)(2), and referred to in the *Betts* decision, was indeed a definitional provision and not an affirmative defense. *Betts*, 492 U.S.

at 181. That pre-*Betts* version of Section 623(f)(2) provided:

> It shall not be unlawful for an employer * * * to observe the terms of a bona fide seniority system or any bona fide benefit plan such as retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual.

Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 81 Stat. 603 § 4(f)(2) (1967). Nothing in the language suggested that it applied only where there had been an *otherwise prohibited* action. The provision simply explained—or defined—the reach of the Act.[19]

Third, the Title VII definitional provision discussed in *Hardison* delineating which employment practices are illegal, and thereby prohibited, and which are not, provides:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin * * * .

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[19] Today, of course, Section 623(f)(2) contains the same prefatory "to take any action *otherwise prohibited* under [the preceding subsections] of this section" language that begins Section 623(f)(1).

Hardison, 432 U.S. at 81-82 (quoting 42 U.S.C. § 2000e-2(h)). Again, there is no premise that there has been an actual violation, only an explanation that "notwithstanding" anything else Title VII states, certain actions are not unlawful employment practices.

C. Administrative History

In 1968, the Department of Labor issued guidelines to interpret the then newly-enacted ADEA. Those guidelines recognized that employment practices that adversely affect older workers are prohibited by the ADEA unless required by the job being performed. For example, Department guidelines stressed that in the case of physical requirements, employer action affecting older workers must be "reasonably necessary for the specific work to be performed." *See* 29 C.F.R. § 860.103(f)(1)(i) (1986). Similarly, factors used to evaluate employees had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(2). The regulations also required that employment practices be "fair and reasonable" and "specifically related to the requirements of the job." 29 C.F.R. § 860.104(b). They further provided that the use of tests would be scrutinized because of the risk that older workers might suffer from a lack of recent testing experience even though they had the abilities required for the job. *Ibid.*

Because they recognized the principle of disparate impact, the Department guidelines generally scrutinized employer actions without any regard to motivation or intent. And the guidelines expressly required that

employer practices be reasonably related to job requirements even if they were otherwise applied "equally" and "uniformly" to employees "regardless of age." *See* 29 C.F.R. § 860.103(f)(1)(i), (f)(2). It is also telling that the regulations expressly limited employment testing—the same practice that prompted the Court to recognize disparate impact in *Griggs*.

The Department of Labor's interpretation is particularly persuasive given the Department's key role in the statute's enactment, as well as the fact that the regulations were promulgated shortly after passage of the ADEA. *See Bingler v. Johnson*, 394 U.S. 741, 749-50 (1969) (agency's interpretation accorded greater weight when made contemporaneously with law's enactment). Notably, the same Secretary of Labor whose report to Congress prompted enactment of the ADEA—Willard Wirtz—was Secretary when the Department issued the guidelines.[20]

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[20] The significance of the Secretary's 1965 report itself, however, has been somewhat overblown. The two leading ADEA anti-disparate impact cases, *Mullin* and *Ellis*, relied on the report's concern with "arbitrary discrimination" as proof that Congress enacted the ADEA to bar only intentional discrimination. *Mullin*, 164 F.3d at 703; *Ellis*, 73 F.3d at 1008. The Secretary's report *does* provide some insight into the origins of the ADEA, but hardly eliminates the viability of disparate impact—especially given that the report was issued seven years before *Griggs*. *See Griggs*, 401 U.S. at 431 (purpose of disparate impact is to deal with arbitrary discrimination); *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1215 (CA7 1987) (Easterbrook, J., dissenting) (same); *see also Brett Ira Johnson, Six of One, Half-Dozen of Another: Mullin v. Raytheon Co. as a Representative of Federal Circuit Courts Erroneously Distinguishing The ADEA From Title VII Regarding Disparate Impact Liability*, 36 IDAHO L. REV. 303, 337-38 (arbitrary does not mean intentional). To the extent that

Administration of the ADEA was transferred to the Equal Opportunity Commission in 1979. Reorganization Plan No. 1 of 1978, 92 Stat. 3781, *reprinted in* 5 U.S.C. app. at 1155 (1982).[21] The EEOC affirmed the viability of disparate impact analysis in terms even more explicit than those used by the Department. The EEOC guidelines relevantly provide:

> When an employment practice, including a test, is claimed as a basis for different treatment of employees * * * on the ground that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity.

29 C.F.R. § 1625.7 (1999). This section has been in effect for over 19 years. It supports not only disparate impact, but also the business necessity requirement that the Court recognized in *Griggs*.

The EEOC's interpretation is entitled to considerable deference. *See, e.g., Griggs*, 401 U.S. 433-34 (The EEOC, "having enforcement responsibility, has issued guidelines interpreting [Title VII] to permit only the use of job-related tests. Administrative interpretation of the Act by

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the report suggests anything about disparate impact, it is hardly binding. To the extent it is persuasive, however, the *amicus curiae* brief of the American Association of Retired Persons correctly analyzes the report and makes clear that an accurate and *complete* reading supports disparate impact analysis under the ADEA.

[21] Since it lacked authority to administer the ADEA in 1978, the EEOC expressly excluded the ADEA from disparate impact guidelines it issued that year.

its enforcing agency is entitled to great deference."); *Western Airlines v. Criswell*, 472 U.S. 400, 412 (1985) ("consistent interpretation" of the ADEA by the Secretary of Labor and EEOC entitled to deference"). Deference is especially appropriate because the decades-old interpretation has not been altered by Congress, notwithstanding the amendments of the ADEA in the intervening years. *United States v. Rutherford*, 442 U.S. 544, 554 n.10 (1979) ("[O]nce an agency's statutory construction has been 'fully brought to the attention of the public and Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.").

D. The Statistics the OWBPA Requires for Downsized Employees Have Little if any Meaning for those Employees Apart from Consideration of Disparate Impact Claims.

In 1987, the Court issued its opinion in *Wards Cove* and seemingly altered the nature of disparate impact under Title VII. 490 U.S. at 659-61. There was never any dispute, however, that disparate impact continued—only what the nature of disparate impact analysis would be. There was also an apparent unanimity that disparate impact continued to apply to the ADEA, Kaminshine, 42 Fla. L. Rev. at 258-75 (discussing prevailing view in 1990), and the Department of Labor (and later the EEOC) had been issuing regulations for over 20 years indicating that disparate impact was available under the ADEA. Against this backdrop, Congress passed the Older Workers

Benefit Protection Act of 1990 (OWBPA) to amend the ADEA and add protections when employers downsize. 29 U.S.C. § 626(f).

When they downsize, it is customary for employers to provide special incentive packages to terminated employees in exchange for releases of legal rights—including rights under the ADEA. Passage of the OWBPA was prompted by concerns that employees may, when they are asked to sign such waivers, lack information to assess meaningfully whether their rights under the ADEA are being violated.[22] As the Committee Report emphasized:

> [E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is not a function of their individual status. Under these circumstances, the need for adequate information and access to legal advice before waivers are signed is especially acute.

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[22] Florida Power used such packages with releases during the downsizing in this case. In its original answer to the complaint, the company alleged counterclaims against several plaintiffs based on the releases. (Doc. 7 pp. 97-112). The plaintiffs moved for summary judgment because the releases failed to advise employees to seek the advice of legal counsel and provide the employees statistical information, as required by the OWBPA. (Doc. 30 p. 5). The district court found the releases invalid under the OWBPA based on the failure to advise the plaintiffs to seek counsel. The court did not address the other grounds the plaintiffs asserted for invalidation. (Doc. 215 pp. 18-21).

S. Rep. No. 101-263, S. 1511, 101st Cong., 2d Sess., at 33-34. The OWBPA accordingly established three safeguards to ensure that downsized employees could make informed decisions when asked to waive their rights under the ADEA.

First, when waivers are sought from a "group or class of employees," the employees must be given at least 45 days to consider the waiver agreement. 29 U.S.C. § 626(f)(1)(F)(ii). Second, the waiver agreement must contain specified provisions, including express advice to "consult with an attorney prior to executing the agreement." 29 U.S.C. § 626(f)(1)(E). Third, when an employer seeks waivers as part of a termination program offered to a group of employees, the employer must provide in writing "the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. 29 U.S.C. § 626(f)(1)(H)(ii). As the Senate Report explained:

> The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination * * * programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.

S. Rep. No. 101-263, at 33-34. In short, "Congress's intent in enacting § 626 was to compel employers to provide data so that an employee considering waiving ADEA rights could assess, with the assistance of counsel, the viability of a potential ADEA claim." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (CA6 1977), *cert. denied*, 522 U.S. 1107 (1998). The OWBPA's disclosure requirements have, accordingly, been strictly enforced. *See Oubre v. Entergy Operations*, 522 U.S. 422, 426-28 (1998).

When Congress required employers to provide age-impact data to employees terminated in downsizings with the specific advice that the employees seek counsel, Congress reflected its understanding that age-impact data was vital to counsel assessing a client's potential claims under the ADEA. As Professor Alfred Blumrosen, Ruth G. Blumrosen, and their colleagues recently observed:

> Only if the statistical information bears heavily on the question of employer liability can counsel give well grounded advice as to whether to take the money and waive ADEA rights. A reasonable estimate of the likelihood of discrimination can be made on the basis of the statistics only if the disparate impact doctrine applies. It cannot be made if the plaintiff must prove disparate treatment.

See Alfred Blumrosen, *et al.*, *Downsizing and Employee Rights*, 50 RUTGERS L. REV. 943, 983 (1998). The Blumrosens are co-counsel for the Academy of Florida Trial Lawyers, an *amicus curiae* in this case. The Academy's thorough analysis of the OWBPA persuasively demonstrates that disparate impact is available under the ADEA in the context of corporate downsizings, even if not in all cases.

E. The Subjectivity of Florida Power's Downsizing Process Further Militates in Favor of Using the Disparate Impact Method in this Case.

Virtually all disparate impact decisions of the courts of appeals have been rendered in cases where employees challenged the effects of objective employment criteria. But disparate impact analysis may serve an additional role when employers downsize based on subjective criteria—a role that goes to the heart of the ADEA. *Compare Watson*, 487 U.S. 998-90 ("It does not follow * * * that the particular supervisors to whom this discretion is delegated always act without discriminatory intent. Furthermore, even if one assumed that any such discrimination can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain * * * .") *with Hazen Paper*, 507 U.S. at 610 (discussing role of the ADEA in addressing employment actions taken "on the basis of inaccurate and stigmatizing stereotypes."). Given that Florida Power's method of downsizing was so subjective (J.A. 327-30), it would be extremely challenging for many members of the Adams Group to prove discrimination by disparate treatment even if they were dismissed because of a culture of ageism that subtly pervaded the workplace. By permitting workers like them to use the disparate impact method of proof, the Court would address the concern it expressed in *Watson* about "an employer's undisciplined system of subjective decisionmaking [that] has precisely the same effects as a system pervaded by impermissible intentional discrimination * * * ." *Watson*, 487 U.S. at 990-91.

II. WHAT ARE REASONABLE FACTORS OTHER THAN AGE, AND HOW DOES THE DEFENSE OPERATE?

The *existence* of disparate impact analysis should be clear. The elephant in the middle of this case, however, is the meaning of "reasonable factors." In *Gunther*, 452 U.S. at 170-71, the Court held that a Title VII defendant facing disparate impact wage-discrimination charges could prevail through the "any other factor other than sex" defense incorporated into Title VII through the Bennett Amendment. To prevail, the employer would have to show that the factor other than sex was both bona fide and sex-neutral. Since Congress chose to add the word "reasonable" to the ADEA's similar defense, it seems logical that a defendant's burden would be greater than a mere showing that its factors were age-neutral and bona fide. How *much* greater is ambiguous, so consideration of the EEOC's interpretation of the term is appropriate.

The EEOC has determined that "[w]hen an employment practice * * * is claimed as a basis for different treatment of employees * * * on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (1999). This standard should apply in ADEA disparate impact cases. If, however, the Court disagrees with the EEOC's interpretation of the ADEA, the analysis in *Wards Cove*, supplemented by the ADEA affirmative defense framework, may provide an appropriate model. ADEA plaintiffs would be able to use the disparate impact method of proving age discrimination, and employers would need to prove that the challenged

action significantly served a legitimate business objective. *Wards Cove*, 490 U.S. at 659. Or, the Court may choose a different model, but—regardless of what meaning the Court attaches to "reasonable factors"—the burden should be on the defendant to prove its affirmative defense.

In this case, if the Adams Group members produce evidence that they were terminated as part of a subjective selection and downsizing process that had a disproportionate impact on Florida Power's older workers, that evidence should be considered a prima facie case of age discrimination. Since Florida Power contends it based its decision to downsize on a need to prepare for competition from deregulation, the case may turn on whether the company was reasonably (or actually) concerned with deregulation—a defense the members of the Adams Group will challenge if given the opportunity to litigate their disparate impact claims.

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the district court for further proceedings to allow the petitioners to proceed with their disparate impact claims under the ADEA.

Respectfully submitted,

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January 2002

APPENDIX

Age Discrimination in Employment Act of 1967,
§ 4(a) & (f), 81 Stat. 603,
Pub. L. 90-202
(Dec. 15, 1967)

SEC. 4. (a) It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this Act.

* * *

(f) It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade

the purposes of this Act, except that no such employee benefit plan shall excuse the failure to hire any individual;

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29 U.S.C. § 621 Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of

meeting problems arising from the impact of age on employment.

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29 U.S.C. § 622 Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures –

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

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29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer –

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

* * *

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization –

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section –

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan –

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title, because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

* * *

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section –

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because –

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for –

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age –

(i) the value of any retiree health benefits received by an indivfdual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii);

are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to

subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

* * *

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29 U.S.C. § 625. Administration

The Secretary shall have the power –

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

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29 U.S.C. § 626 Recordkeeping, investigation, and enforcement

* * *

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum –

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to –

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum –

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and (B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

* * *

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29 U.S.C. § 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

* * *

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29 U.S.C. § 630 Definitions

For the purposes of this chapter –

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with

employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia,

or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

* * *

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42 U.S.C. § 2000e-2(a)(2)

(a) Employer practices

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain

instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

* * *

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give

and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * *

(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if –

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except

that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

(l) Prohibition of discriminatory use of test scores

It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

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29 USC § 206(d) Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

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29 C.F.R. § 1625.7

CODE OF FEDERAL REGULATIONS

TITLE 29 – LABOR

SUBTITLE B – REGULATIONS RELATING TO LABOR

CHAPTER XIV – EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

PART 1625 – AGE DISCRIMINATION IN EMPLOYMENT ACT

SUBPART A – INTERPRETATIONS

Current through January 1, 2002; 66 FR 67702

§ 1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f) (1) of the Act provides that

* * * it shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * .

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a "factor other than" age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as "reasonable factors other than age" will be scrutinized in accordance with the standards set forth at Part 1607 of this Title.

(e) When the exception of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of showing that the "reasonable factor other than age" exists factually.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the section 4(f) (2) exception to the Act.

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29 C.F.R. 860.103 (1986)

Chapter V – Wage and Hour Division,
Department of Labor

Subchapter C – Age Discrimination in Employment

Part 860 – Interpretations

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * * "

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age, within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual, case by case basis, not on the

basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agency or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age.

(f)(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: Provided, however. That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs,

underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(ii)(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, where as another individual of age 30 may be physically incapable of doing so.

(ii)(iii)(2) Evaluation factors such as quantity or quality of production, or educational level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do no [sic] have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a

group is higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation – an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 FR 9173, June 21, 1968]

Authority: 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10-68, and Secretary's Order No. 11-68.

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29 C.F.R. 860.104 (1986)

§ 860.104 Differentiations based on reasonable factors other than age – Additional examples.

(a) Employment of Social Security recipients (a)(1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used

as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(a)(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's condition as to the number or schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) Employee testing The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their

schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) Refusal to hire relatives of current employees There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 FR 322, Jan. 9, 1969, as amended at 34 FR 9709, June 21, 1969]

Authority: 81 Stat. 602; 29 U.S.C. 620, 5 U.S.C. 301, Secretary's Order No. 10-68, and Secretary's Order No. 11-68.

FOR ARGUMENT

Supreme Court, U.S.
FILED
FEB 25 2002

No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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QUESTION PRESENTED

Whether and, if so, in what circumstances disparate impact claims are cognizable under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-34.

RULE 29.6 STATEMENT

Respondent Florida Power Corporation is a wholly-owned subsidiary of respondent Florida Progress Corporation, which is in turn a wholly-owned subsidiary of Progress Energy Corporation. Progress Energy Corporation has issued stock to the public, and the only publicly-held company owning more than 10% of its stock is State Street Bank and Trust Co.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. DISPARATE IMPACT CLAIMS ARE NOT COGNIZABLE UNDER THE ADEA 6

A. The Text Of The ADEA Precludes Disparate Impact Claims 6

1. Section 4(a) Is Naturally Read To Prohibit Only Intentional Discrimination 7

2. The RFOA Provision Precludes Disparate Impact Claims 10

3. The ADEA Addresses Disproportionate Effects On Older Workers Through Non-Coercive Education, Training, And Manpower Programs 14

B. The Legislative History Confirms That Disparate Impact Claims Are Not Cognizable .. 16

C. The Disparate Impact Doctrine Is Incompatible With The ADEA 19

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT COMPEL RECOGNITION OF DISPARATE IMPACT CLAIMS UNDER THE ADEA 26

TABLE OF CONTENTS
(continued)

Page

A. Disparate Impact Claims Are Not Recognized Where Statutory Provisions Foreclose Them ... 27

B. There Are Substantial Reasons Not To Carry *Griggs'* Construction of Title VII Over To The ADEA ... 28

III. THE ARGUMENTS OF PETITIONERS AND THEIR *AMICI* FOR RECOGNIZING DISPARATE IMPACT CLAIMS ARE WITHOUT MERIT ... 33

A. Petitioners' Suggestion That Section 4(a)(2) Cannot Properly Be Construed To Have An Intent Requirement Is Unfounded ... 33

B. Disparate Impact Doctrine Is Not Necessary To Give Meaning And Effect To The RFOA Provision ... 35

C. Petitioners' Legislative History Arguments Are Also Without Merit ... 42

D. The Interpretive Bulletins Of The DOL And The EEOC Do Not Justify Recognizing Disparate Impact Claims Under The ADEA ... 44

E. Disparate Impact Doctrine Was Not Incorporated Into The ADEA By Subsequent Congressional Action (Or Inaction) ... 48

CONCLUSION ... 50

TABLE OF AUTHORITIES

Page

Cases

AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation, 113 F.3d 347 (2d Cir. 1997) ... 20
Akins v. Texas, 325 U.S. 398 (1945) ... 4, 7
Alexander v. Sandoval, 121 S. Ct. 1511 (2001) ... 4
Allen v. Entergy, Inc. 193 F.3d 1010 (8th Cir. 1999) ... 20
Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) ... 21
Am. Tobacco Co. v. Patterson, 456 U.S. 63 (1982) ... 27, 36
Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) ... 21
Arnold v. Postmaster Gen., Nos. 87-5361 (D.C. Cir. Mar. 10, 1988) ... 46
Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) ... 29
Bittar v. Air Canada, 512 F.2d 582 (5th Cir. 1975) ... 11
Cent. Bank of Denver, N.A. v. First Interstate Bank, 511 U.S. 164 (1994) ... 50
Chickasaw Nation v. United States, 122 S. Ct. 528 (2001) ... 42
Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302 (2001) ... 13
City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) ... 26
City of Mobile v. Bolden, 446 U.S. 55 (1980) ... 4
Connecticut v. Teal, 457 U.S. 440 (1982) ... 26, 30
County of Washington v. Gunther, 452 U.S. 161 (1981) ... 28, 40
Crimm v. Missouri Pac. R.R. Co., 750 F.2d 703 (8th Cir. 1984) ... 10

TABLE OF AUTHORITIES
(continued)

Page

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Cunningham v. Cent. Beverage, Inc., 486 F. Supp. 59 (N.D. Tex. 1980) 25
DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 9, 26, 30
Dothard v. Rawlinson, 433 U.S. 321 (1977) 31
EEOC v. ARAMCO, 499 U.S. 244 (1991) 28
EEOC v. Governor Mifflin Sch. Dist., 623 F. Supp. 734 (E.D. Pa. 1985) 25
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EEOC v. Newport Mesa Unified Sch. Dist., 893 F. Supp. 927 (C.D. Cal. 1995) 40
EEOC v. Wyoming, 460 U.S. 226 (1983) ..... *passim*
Ellis v. United States, 73 F.3d 999 (10th Cir. 1996) 7, 23, 30
FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 30
Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992) 25
Fogerty v. Fantasy, Inc., 510 U.S. 517 (1994) 31, 49
Fort Stewart Schools v. FLRA, 495 U.S. 641 (1990) 13
Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978) .. 12
Gallagher v. Crown Kosher Super Market of Mass., Inc., 366 U.S. 617 (1961) 12
Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981) 48
Gen. Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375 (1982) 4, 5, 8

TABLE OF AUTHORITIES
(continued)

Page

Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) 7, 8, 27
Goldstein v. Manhattan Indus., Inc., 758 F.2d 1435 (11th Cir. 1985) 22
Granfinanciera v. Nordberg, 492 U.S. 33 (1989) 21
Gregory v. Ashcroft, 501 U.S. 452 (1991) 24
Griggs v. Duke Power Co., 401 U.S. 424 (1971) .. 2, 4, 43
Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) 24
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) .. *passim*
Hoffmann-LaRoche, Inc. v. Sperling, 493 U.S. 165 (1989) 22
J.E.M. AG Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc., 122 S. Ct. 593 (2001) 41
Johnson v. Santa Clara Transp. Agency, 480 U.S. 616 (1987) 38
Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) 11, 31
Krieg v. Paul Revere Life Ins. Co., 718 F.2d 998 (11th Cir. 1983) 11
Landgraf v. USI Film Prod., 511 U.S. 244 (1994) 13, 41, 50
Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975) 24, 47
Loeb v. Textron, 600 F.2d 1003 (1st Cir. 1979) 11, 13
Lorance v. AT&T Tech., Inc., 490 U.S. 900 (1989) 36
Lorillard v. Pons, 434 U.S. 575 (1978) 20, 28, 50
Los Angeles v. Manhart, 435 U.S. 702 (1978) 27, 28
Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989) 23
Mackey v. Lanier Collection Agency Serv., Inc., 486 U.S. 825 (1988) 13
Markham v. Geller, 451 U.S. 945 (1981) 6, 47, 48

TABLE OF AUTHORITIES
(continued)

Page

Mass. Bd. of Retir. v. Murgia, 427 U.S. 307 (1976) 24, 31, 32
Massachusetts v. Morash, 490 U.S. 107 (1989) 13
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 12, 31, 50
McGowan v. Maryland, 366 U.S. 420 (1961) 12
McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352 (1995) 14, 15
Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir. 1987) 12, 25, 49
Mt. Healthy City Sch. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) 10
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) 7
Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) 27
New York Transit Auth. v. Beazer, 440 U.S. 568 (1979) 39
O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996) 22, 23, 28
Ohio Pub. Employees Retirement Sys. v. Betts, 492 U.S. 158 (1989) ..... *passim*
Oscar Meyer & Co. v. Evans, 441 U.S. 750 (1979) 29
Perrin v. United States, 444 U.S. 37 (1979) 35
Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) 8
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) . 10, 21
Radio Officers' Union v. NLRB, 347 U.S. 17 (1954) 4
Randolph Cent. Sch. Dist. v. Aldrich, 506 U.S. 965 (1992) 41
Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000) 8, 28, 37
Russello v. United States, 464 U.S. 16 (1983) 38

TABLE OF AUTHORITIES
(continued)

Page

Schwager v. Sun Oil Co., 591 F.2d 58 (10th Cir. 1979) 10
Skidmore v. Swift Co., 323 U.S. 134 (1944) 46
Standard Oil Co. v. United States, 221 U.S. (1911) 29
Steelworkers v. Weber, 443 U.S. 193 (1968) 37
Sutton v. United Airlines, 527 U.S. 471 (1999) 16
Teamsters v. Terry, 494 U.S. 558 (1990) 20
United Air Lines, Inc. v. McMann, 434 U.S. 192 (1977) 14
United States v. Fausto, 484 U.S. 439 (1988) 38
United States v. Mead Corp., 121 S. Ct. 2164 (2001) 46
United States v. Ron Pair Enterp., 489 U.S. 235 (1989) 34
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) ..... *passim*
Washington v. Davis, 426 U.S. 229 (1976) 4, 5, 6, 7
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) ..... *passim*
Western Air Lines, Inc. v. Criswell, 472 U.S. 400 (1985) 39

Statutes

Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 265 (1964) 17
81 Stat. 602 ..... 14, 19
104 Stat. 978 36
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5 U.S.C. § 553(d) 46
29 U.S.C. § 206(d) 28, 42
29 U.S.C. § 216(b) 22

TABLE OF AUTHORITIES
(continued)

Page

Age Discrimination in Employment Act of 1967,
29 U.S.C. §§ 621-34 ..... 1, 15,16
29 U.S.C. §§ 621(b) 16
29 U.S.C. § 622(a) 7, 15, 16
29 U.S.C. § 623(a) 16
29 U.S.C. § 623(c) 34
29 U.S.C. § 623(f)(1) ..... *passim*
29 U.S.C. § 623(f)(2) 14, 15, 38
29 U.S.C. § 623(f)(3) 15
29 U.S.C. § 623(j) 14
29 U.S.C. § 626(b) 22
29 U.S.C. § 626(c) 20, 21, 48
29 U.S.C. § 626(f) 39, 49
29 U.S.C. § 628 46
29 U.S.C. § 631(a) 37
29 U.S.C. § 631(c) 14
42 U.S.C. § 1981a 20
42 U.S.C. § 2000e-2 ..... *passim*

Legislative Materials

EEOC Legislative History of the Age Discrimination in Employment Act of 1967 (1981) 18, 19
Hearings on H.R. 3651, H.R. 3768, & H.R. 4221 Before the General Comm.on Labor of the House Comm. on Education and Labor, 90th Cong. 8 (1967) 19
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H. Rep. 101-664 (1990) 49
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TABLE OF AUTHORITIES
(continued)

Page

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29 C.F.R. § 800.115(d) (1965) 41
29 C.F.R. § 860.1 (1970) 44, 45
29 C.F.R. § 860.103(b) (1970) 44
29 C.F.R. § 860.103(c) (1970) 44
29 C.F.R. § 860.103(d) (1970) 44
29 C.F.R. § 860.104(b) (1970) 44
Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 46
29 C.F.R. § 1607.1(A) 46
29 C.F.R. § 1607.2(D) 46
29 C.F.R. § 1607.3(B) 39, 46
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Final Interpretations: Age Discrimination in Employment Act, 46 Fed.Reg. 47,724 (1981) 46, 47
29 C.F.R. § 1625.7 ..... 39, 45
Proposed Interpretations, 44 Fed. Reg. 68,858 (1979) .. 47

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TABLE OF AUTHORITIES
(continued)

Page

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TABLE OF AUTHORITIES
(continued)

Page

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COUNTERSTATEMENT OF THE CASE

1. In 1992, Congress passed the Energy Policy Act of 1992, 106 Stat. 2776 (1992), opening utilities such as respondent Florida Power Corporation to increased competition. In response, Florida Power reengineered its business processes and, between 1992 and 1996, eliminated more than 1,200 positions. J.A. 32, 54-57, 64-65, 104-06. Petitioners are 117 former employees, then ranging from ages 39 to 62, who lost their jobs. Resp. App. 7a; J.A. 33-43.

2. Petitioners sued Florida Power and respondent Florida Progress Corporation for, *inter alia*, allegedly violating the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621-34. The district court decertified an opt-in class that it had conditionally certified to facilitate settlement, finding that petitioners' disparate treatment claims were dissimilar, because petitioners were "terminated at different times by different decision makers based on different considerations o[r] criteria," and holding that "the disparate impact theory of liability is not applicable to ADEA claims." Pet. App. 22a-24a.

3. On interlocutory appeal, the Eleventh Circuit affirmed. Siding with five other circuits, it held that the ADEA does not allow disparate impact claims. Pet. App. 5a-8a.

The court found that the ADEA's approval of differentiations "based on reasonable factors other than age," 29 U.S.C. § 623(f)(1), "raise[s] doubts about extending the disparate impact theory of liability to ADEA cases." Pet. App. 7a. It also found that the report of the Secretary of Labor on which the ADEA is based had recommended that "factors affecting older workers, such as policies with disparate impact, be addressed in alternative ways." *Id.* Finally, it found that the reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), is "inconsistent with the viability of a disparate impact theory of liability." Pet. App. 8a.

Judge Barkett concurred. In her view, petitioners had not stated a viable disparate impact claim. Pet. App. 9a. She otherwise would have allowed such claims. Pet. App. 9a-18a.

SUMMARY OF ARGUMENT

Consistent with traditional notions that unlawful discrimination requires actual discriminatory intent, this Court has indicated that it will extend Title VII's "disparate impact" doctrine—*i.e.*, liability based on unjustified adverse effects rather than on discriminatory intent—to other statutory contexts only where there is "convincing evidence" that Congress intended it. The ADEA contains no such evidence.

I. Section 4(a) of the ADEA applies only to employer actions taken "because of" age, a conventional reference to discriminatory intent. Moreover, by providing that an action is lawful where "based on reasonable factors other than age," Section 4(f)(1) further refers to intent and thereby confirms that a finding of discriminatory intent is required. In addition, other statutory provisions and legislative history reveal that, rather than prohibit neutral practices with adverse effects on older workers, the ADEA addresses such disadvantages through education, training, and manpower programs. Finally, disparate impact claims are incompatible with the ADEA's scheme, including its jury trial provision, opt-in procedures, and continuum of protected individuals. Indeed, because non-age factors having differential age-specific impacts are inescapable, recognition of ADEA disparate impact claims would predictably force employers to abandon valuable practices and/or make use of quotas. There is no basis for construing the ADEA to do so.

II. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny do not compel recognition of disparate impact claims under the ADEA. Even under Title VII, disparate impact claims are not recognized where statutory provisions foreclose them; by making discriminatory intent essential, the ADEA forecloses disparate impact claims. Moreover, there are

substantial reasons for not carrying this Court's construction of Title VII over to the ADEA: In addition to being enacted before *Griggs*, the ADEA addresses much more limited concerns than does Title VII; in particular, the concerns that led to recognition of disparate impact claims under Title VII are absent in the ADEA. Because older workers as a class have not suffered a history of purposeful unequal treatment, shortcomings in their abilities and performance cannot be attributed to prior discrimination. Moreover, where present, discrimination against older workers is not normally motivated by deep-seated animus, but rather by generalizations about older workers' abilities to do a job. The disparate treatment doctrine fully addresses this concern about such stereotyping.

III. Contrary to petitioners' suggestion, Section 4(a) can be, and in fact is most naturally, construed to require discriminatory intent. Nor can disparate impact doctrine be inferred from Section 4(f)(1)'s "reasonable factors other than age" ("RFOA") provision. The doctrine is not needed to give meaning and effect to the RFOA provision, because that provision substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases, and because it clarifies that employers are permitted to use neutral criteria not directly dependent on age. Nor does it matter whether the RFOA provision is an affirmative defense (which it is not); in either event, the RFOA provision confirms that, under the ADEA, discriminatory intent is essential.

In addition, neither the legislative history nor the early interpretations of the Department of Labor ("DOL") recognize disparate impact claims. Furthermore, the interpretations later offered by the Equal Employment Opportunity Commission ("EEOC") conflict with the position of the Department of Justice ("DOJ"), are not supported by valid reasoning, and are contrary to law. Finally, no subsequent congressional enactment amends the ADEA to allow disparate impact claims.

ARGUMENT

The question presented here is whether the ADEA makes actionable "disparate impact" claims—*viz.*, claims that a facially-neutral practice is unlawful because, without regard to intent, the practice has a disproportionate adverse effect on older workers as a class and does not have a sufficiently demonstrated business justification. The ADEA's text, history, structure, and purposes demonstrate that ADEA "disparate impact" claims are not cognizable.

The essential tradition of federal anti-discrimination law—in its multiple constitutional and statutory manifestations—is to make actionable "disparate treatment" claims—*viz.*, claims that a practice is unlawful because it was adopted and applied for discriminatory purposes. *See, e.g., Akins v. Texas*, 325 U.S. 398, 403-04 (1945) (Equal Protection and Due Process); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-44 (1954) (National Labor Relations Act). Although *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and its progeny have construed Title VII of the Civil Rights Act of 1964 to allow "disparate impact" claims in certain limited circumstances, this Court has otherwise declined to interpret federal anti-discrimination laws that are not explicit in this regard to provide for "disparate impact" claims. *See, e.g., City of Mobile v. Bolden*, 446 U.S. 55, 61-74 (1980) (Fifteenth Amendment); *Washington v. Davis*, 426 U.S. 229, 238-48 (1976) (Equal Protection Clause); *Gen. Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 383-91 (1982) (42 U.S.C. § 1981); *Alexander v. Sandoval*, 121 S. Ct. 1511, 1520-23 (2001) (Title VI).

The Court's refusal to recognize a "disparate impact" doctrine of general application reflects its understanding both that "[i]t would be . . . unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces," *Watson v. Fort Worth Bank & Trust*, 487

U.S. 977, 992 (1988) (op. of O'Connor, J.), and that a general disparate impact doctrine would be "far reaching and would raise serious questions about, and perhaps invalidate, a whole range" of facially-neutral laws and common facially-neutral practices. *Washington v. Davis*, 426 U.S. at 248; *see also Watson*, 487 U.S. at 991-92. Indeed, because so many important selection practices are not subject to precise evidentiary verification, *accord id.*, the Court has expressed concern that a general disparate impact doctrine could lead employers to rely on quotas as a liability-avoidance measure. *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989). Against this background, the Court has indicated that a federal anti-discrimination law will be construed to provide for disparate impact claims only where there is "convincing evidence" that Congress intended to go beyond making intentional discrimination unlawful. *Gen. Bldg. Contractors Ass'n*, 458 U.S. at 391; *see also Washington v. Davis*, 426 U.S. at 248 ("legislative prescription" necessary).

The ADEA contains no such convincing evidence. As this Court recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper* holds that the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612 (emphasis in original). While not directly resolving whether disparate impact claims are cognizable, *id.* at 610, the reasoning of *Hazen Paper* goes far to show that such claims are not cognizable. *Hazen Paper* rests on the premise that, under the ADEA, proof that a selection practice statistically correlates with age is *not* legally sufficient to establish a *prima facie* case of discrimination. *See id.* at 611 ("When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . .").

As then-Justice Rehnquist observed over 20 years ago, the statutory base for *Hazen Paper*'s reasoning and result is that a neutral practice does not differentiate "because of" age within the meaning of Section 4(a); and the "reasonable factors other than age" provision in Section 4(f)(1) confirms that Congress "did not intend the ADEA to have the restraining influence" on employers that disparate impact claims would provide. *Markham v. Geller*, 451 U.S. 945, 946-47 (1981) (Rehnquist, J., dissenting from denial of certiorari). Rather, the ADEA embodies the Secretary of Labor's conclusion, reported to Congress, that barring neutral practices with adverse effects on older workers is "futile as public policy, and even contrary to the public interest," and that such practices and their effects are better addressed through non-coercive education, training, and manpower programs. *See* Report of the Secretary of Labor, *The Older American Worker: Age Discrimination in Employment* 21-25 (1965) (J.A. 403-16). It is "inappropriate simply to transplant [the *Griggs*' Title VII disparate impact] standards . . . into [such] a different statutory scheme having a different history." *Washington v. Davis*, 426 U.S. at 255 (Stevens, J., concurring); *accord Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

I. DISPARATE IMPACT CLAIMS ARE NOT COGNIZABLE UNDER THE ADEA

A. The Text Of The ADEA Precludes Disparate Impact Claims

Under Section 4(a) of the ADEA, it is generally unlawful for an employer:

> (1) *to fail or refuse to hire* or *to discharge* any individual *or otherwise discriminate* against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual's age*;

> (2) *to limit, segregate, or classify* his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of such individual's age* . . . .

29 U.S.C. § 623(a) (emphasis added). "A commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999); *accord Ellis v. United States*, 73 F.3d 999, 1007 (10th Cir. 1996). While that suggestion may not be dispositive, other ADEA provisions compel this particular interpretation.

1. Section 4(a) Is Naturally Read to Prohibit Only Intentional Discrimination

On its face, Section 4(a) of the ADEA is an anti-discrimination provision, and the "concept of 'discrimination,' of course, was well known at the time of the enactment of [the ADEA], having been associated with the Fourteenth Amendment for nearly a century and carrying with it a long history of judicial construction." *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 145 (1976). In that context, actionable "discrimination" is adverse action motivated by unlawful intent. *See Washington v. Davis*, 426 U.S. at 238-48; *Akins*, 325 U.S. at 403-04. Indeed, when the ADEA was passed, the "prevailing view" was that "discrimination required a purpose or motive to harm an individual because of [the protected trait]." Alfred W. Blumrosen, *Strangers in Paradise:* Griggs v. Duke Power Co. *and the Concept of Employment Discrimination*, 71 Mich. L. Rev. 59, 69 (1972) [hereinafter "Blumrosen, *Strangers in Paradise*"]; Arthur E. Bonfield, *The Substance of American Fair Employment Practices Legislation I: Employers*, 61 N.W. U. L. Rev. 907, 955-58, 970 (1967). Against that backdrop, the Court "should not readily infer" that Section 4(a) embodies a concept of discrimination that is "something different from what the

concept of discrimination has traditionally meant." *Gen. Elec. Co.*, 429 U.S. at 145.

Far from departing from the traditional concept, Sections 4(a)(1) and 4(a)(2) provide that actions are unlawful only where taken "because of" age. Actions taken "because of" age are actions taken "by reason of" or "on account of" age, *Webster's Third New Int'l Dictionary* 194 (1976), which certainly implies intent rather than mere effect. *See Gen. Bldg. Contractors Ass'n*, 458 U.S. at 388-89 n.15. Moreover, the Court has a long history of reading prohibitions on adverse action "because of" a protected trait as prohibitions on intentional discrimination. *See, e.g., Hazen Paper*, 507 U.S. at 609 (explaining that "disparate treatment" occurs when an employer takes action "*because of* such individual's age") (emphasis in original); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (observing that a "[d]iscriminatory purpose" implies an action "selected or reaffirmed . . . *'because of,'* not merely 'in spite of,' its adverse effects upon an identifiable group") (emphasis added).

On that reading of Section 4(a), it is not enough for an ADEA plaintiff to prove that an action adversely affected older workers (or that, if the employer had considered the matter further, it could have used another practice that would have proven more advantageous for older workers). Rather, it is incumbent on the plaintiff to prove that the action was intentionally taken "because of," not merely in spite of, its adverse effects on the older worker. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133, 141 (2000) (under the ADEA, "'liability depends on whether the protected trait . . . actually motivated the employer's decision.'") (citations omitted).

Section 4(a)(2)'s use of the language "adversely affect" does not compel a different conclusion. That language, which is part of the more extensive phrase "deprive or tend to deprive any individual of employment opportunities or

otherwise adversely affect his status as an employee," is not naturally read as establishing a standard of liability at all. It is instead most naturally read as setting forth the injuries that must result from the employment practices addressed by Section 4(a)(2). Those employment practices are ones that "limit, segregate, or classify . . . because of . . . age." Thus, under the most natural reading of Section 4(a)(2), the "because of" language is understood to indicate that unlawful intent is necessary to establish liability for an employment practice that "adversely affect[s]" an older worker. Indeed, the comma between the "adversely affect" and "because of" language makes it grammatically questionable to read the "adversely affect" phrase as part of the standard of liability. *See DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 733 (3d Cir. 1995) (op. of Greenberg, J.); Pamela S. Krop, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 842 & n.27 (1982).

This reading of Section 4(a)(2) provides a natural congruence with Section 4(a)(1). The "because of" language in Section 4(a)(1) plainly modifies the practices covered by that section (*i.e.*, "to fail or refuse to hire or to discharge . . . or otherwise discriminate . . . ."). As a matter of parallelism, the "because of" language in Section 4(a)(2) is best read as modifying the practices covered by that provision (*i.e.*, "to limit, segregate, or classify"). It follows that, if Section 4(a)(1) is limited to acts of intentional discrimination (as its use of the term "discriminate" and the language "because of" indicates), Section 4(a)(2) is so limited as well. Not only is the text of the two sections structured in parallel fashion, but it would be odd for the two subsections to adopt different theories of wrong and yet key them to the same phrase "because of."

2. The RFOA Provision Precludes Disparate Impact Claims

Any interpretive doubt about whether Section 4(a) is limited to disparate treatment claims is resolved by Section 4(f)(1). By ensuring that liability turns on intent, the latter provision forecloses disparate impact claims.

Section 4(f)(1) states in pertinent part that "[i]t shall not be unlawful . . . to take any action otherwise prohibited" by Section 4(a) "where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). In its common legal usage, the term "factor" refers to motive or intent. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (op. of Brennan, J.); *Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); 42 U.S.C. § 2000e-2(m). Moreover, as petitioners concede (Pet. Br. 26), the phrase "'based on' requires a principal component or foundation—a requirement that would appear to require intent where, as here, the term is combined with a reliance on 'reasonable factors.'" *Accord Webster's Third New Int'l Dictionary* 180. As the term "differentiation" plainly refers to the practices subject to possible challenge under Section 4(a), naturally and fairly read, the RFOA provision makes lawful any practice ("differentiation") founded ("based") on reasonable intentions ("factors") other than age.

Recognizing that the RFOA provision focuses on intent, the courts of appeals have long held that it confirms that an action is lawful where the employer's explanation is not a "pretext" for intentional discrimination—with the plaintiff at all times carrying the burden of persuasion. *See, e.g., Schwager v. Sun Oil Co.*, 591 F.2d 58, 61 (10th Cir. 1979) ("Once the defendant produces evidence tending to show that the termination was based on reasonable factors other than age, the plaintiff must still bear the ultimate burden of establishing his or her case of discrimination by a preponderance of the evidence."). *Accord Crimm v. Missouri Pac. R.R. Co.*, 750 F.2d 703, 712 (8th Cir. 1984); *Krieg v. Paul Revere Life Ins. Co.*, 718 F.2d 998, 999 (11th Cir. 1983) (*per curiam*); *Loeb v. Textron*, 600 F.2d 1003, 1016 (1st Cir. 1979); *Bittar v. Air Canada*, 512 F.2d 582, 582-83 (5th Cir. 1975).

In this same vein, the courts of appeals have also construed the RFOA provision as providing the ADEA's answer to the so-called "mixed motives" dilemma; as Judge J. Skelly Wright wrote for the D.C. Circuit in an oft-cited decision:

> Differentiation "because of" age is unlawful, but not differentiation attributable to "reasonable factors other than age." A transgression arises only if age contributed to the employer's action—so that the differential cannot be ascribed to influences "other" than age. If age is what tips the scale in an adverse employment decision, a violation of the Act has occurred. Conversely, if reasonable and lawful factors dictate and support the employer's decision, additional consciousness of age is not itself interdicted by the Act. The courts agree that age need not be the sole factor, or even the most compelling; it simply must be a consideration that made a difference in shaping the outcome.

Cuddy v. Carmen, 694 F.2d 853, 858 n.23 (D.C Cir. 1982) (citations omitted). Notably, *Hazen Paper* similarly observed that, under the ADEA, "a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." 507 U.S. at 610.

The RFOA provision's recognition that intent is outcome-determinative forecloses disparate impact claims. On the one hand, the RFOA provision "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.'" *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 648 (2000) (quoting *Hazen Paper*, 507 U.S. at 611). On the other hand, the RFOA provision "insure[s] that employers [a]re permitted to use neutral criteria not directly

dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). That being so, Judge Frank Easterbrook has stated that the ADEA's structure is "incomprehensible unless the prohibition [in Section 4(a)] forbids disparate treatment and the exception [in Section 4(f)(1)] authorizes disparate impact." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir. 1987) (Easterbrook, J., dissenting) (quotation omitted).

The RFOA provision's use of the term "reasonable" is entirely consistent with this conclusion. The term "reasonable" modifies the term "factors"—not the term "differentiation"—and, as noted above, the term "factors" is naturally understood to refer to intent; petitioners have even conceded that point. *See* Pet. Br. 26-27. Moreover, while the term "reasonable" has many usages, one accepted use is to refer to something that is "[a]ccording to reason," *Black's Law Dictionary* 1272 (7th ed. 1999), or "using or showing reason." *Webster's New World Dictionary* 1183 (2d ed. 1982).

Indeed, in equal protection law at the time of the ADEA's enactment, the term "reasonable" was used in this sense—*i.e.*, as a reference to "rational." *See, e.g., Gallagher v. Crown Kosher Super Market of Mass, Inc.*, 366 U.S. 617, 624 (1961) (a "classification having some *reasonable basis* does not offend against (the equal protection) clause") (emphasis added); *McGowan v. Maryland*, 366 U.S. 420, 428 (1961) (finding no equal protection violation because there was "no indication of the *unreasonableness* of this *differentiation*") (emphasis added); *see also Ballentine's Law Dictionary* 1057, 1060 (3d ed. 1969) (equating "reasonable basis" and "rational basis"). The Court's general "disparate treatment" cases use the term "reasonable" in this same way. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978) (observing that, if a plaintiff produces sufficient evidence of unlawful intent to survive a directed verdict, the defendant must offer "proof of a justification which is *reasonably related* to the achievement of some legitimate goal.") (emphasis added); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03

(1973) (employer must offer a "*reasonable* basis" for rejection of applicant) (emphasis added).

In short, the office of the term "reasonable" in the RFOA provision is to restate the anti-discrimination law's traditional requirement of a rational intention for an employer's purported non-discriminatory actions. It is not a basis for importing disparate impact claims into the ADEA. *See Loeb v. Textron*, 600 F.2d at 1012 n.6 ("The reasonableness of the employer's reasons may of course be probative of whether they are pretexts. The more idiosyncratic or questionable the employer's reason, the easier it will be to expose it as a pretext, if indeed it is one.").

The RFOA provision in fact has the important function of clarifying and confirming that Section 4(a) is best understood as not recognizing disparate impact claims. Legislation frequently includes clarifying provisions that are not technically necessary in order to, among other things, remove argued ambiguities, reassure skeptics, and/or constrain future interpretations by administrative agencies and courts. *See, e.g., Landgraf v. USI Film Prod.*, 511 U.S. 244, 259-62 (1994); *Massachusetts v. Morash*, 490 U.S. 107, 114 n.9 (1989); *Mackey v. Lanier Collection Agency Serv., Inc.*, 486 U.S. 825, 838-39 & n.13 (1988). This Court has even noted that insertion of "technically unnecessary" provisions "out of an abundance of caution" is "a drafting imprecision venerable enough to have left its mark on legal Latin (*ex abundanti canutela*)." *Fort Stewart Schools v. FLRA*, 495 U.S. 641, 646 (1990). *Accord Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1316 (2001) (Stevens, J., dissenting); *id.* at 1322 (Souter, J., dissenting). So, in addition to substantively governing "pretext" and "mixed-motive" cases, the RFOA provision serves a perfectly proper clarifying function insofar as it "underscore[s] the necessity of determining the employer's motives . . . , an essential element in determining whether the employer violated the federal antidiscrimination

law." *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 360 (1995).

3. The ADEA Addresses Disproportionate Effects On Older Workers Through Non-Coercive Education, Training, And Manpower Programs

Other ADEA provisions reinforce the conclusion that the statute does not recognize disparate impact claims. Because age plays a role in employment that is complicated and nuanced, the ADEA is not a sweeping prohibition on any and all employment practices that adversely affect older workers. Rather, while it prohibits certain acts of intentional discrimination, the ADEA also expressly authorizes other explicit uses of age, permits neutral practices that may adversely affect older workers, and attempts to address consequential disadvantages that older workers may face through non-coercive education, training, and manpower programs.

Specifically, as originally enacted, while Section 4(a) barred discrimination "because of" age, the ADEA did not even apply to all individuals age 40 and over, but only to those individuals age 40 to age 65. *See* 81 Stat. 602, 607. Mandatory retirement programs were permissible, *see United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), as was age-based discrimination under the terms of a "bona fide employee benefit plan." *Ohio Pub. Employees Retirement Sys. v. Betts*, 492 U.S. 158, 181-82 (1989). Even now, the ADEA permits mandatory retirement for certain firefighters, executives, and policymakers, *see* 29 U.S.C. §§ 623(j), 631(c), and permits age-based provisions in early retirement plans and benefit plans, *see id.* § 623(f)(2). Moreover, intentional discrimination is permissible where age is a "bona fide occupational qualification reasonably necessary to the normal operations" of a business. *Id.* § 623(f)(1).

In addition, "[t]he statute does not constrain employers from exercising significant other prerogatives and discretions

in the course of the hiring, promoting, and discharging of their employees." *McKennon*, 513 U.S. at 361. Section 4(f)(3) makes it lawful "to discharge or otherwise discipline an individual for good cause." 29 U.S.C. § 623(f)(3). Section 4(f)(2) makes it lawful "to observe the terms of a bona fide seniority system . . . ." *Id.* § 623(f)(2). And the RFOA provision states that it shall be lawful "to take any action . . . where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1). These "various exemptions and affirmative defenses . . . illustrat[e] . . . [that] Congress recognized that not all age discrimination in employment is 'arbitrary,'" *Betts*, 492 U.S. at 176, and, in addition, clarify that the ADEA does not prohibit neutral practices, whether or not such practices have disproportionate adverse effects on older workers.

Section 3 of the ADEA addresses practices with such disproportionate effects. Section 3 charges the Secretary of Labor with undertaking and promoting research "with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills." 29 U.S.C. § 622(a)(1). Section 3 also requires the Secretary to publish "the findings of studies and other materials for the promotion of employment" of older workers, *id.* § 622(a)(2), and to foster programs for "expanding the opportunities and potentials of older persons," *see id.* § 622(a)(3). Finally, Section 3 requires the Secretary to increase educational opportunities for older workers by "sponsor[ing] and assist[ing] State and community information and educational programs." *Id.* § 623(a)(4). Thus, while the prohibitions in Section 4 of the ADEA do not reach neutral practices with disproportionate impact, in Section 3 the statute provides a broad range of non-coercive government action aimed at the barriers to the employment of older workers.

The ADEA's findings and purposes reflect this dichotomy. Section 2 of the ADEA recognizes not only that the "setting of arbitrary age limits regardless of potential for job performance

ha[d] become a common practice," but also that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). The only jurisdictional finding in the ADEA, however, is that "arbitrary discrimination in employment because of age[] burdens commerce and the free flow of goods." *Id.* § 623(a)(4). Accordingly, while Section 2(b) announces that one purpose of the ADEA is to "prohibit arbitrary age discrimination in employment," it separately states its additional purpose of "help[ing] employers and workers find ways of meeting the problems arising from the impact of age on employment." *Id.* § 621(b). In short, the ADEA's findings and stated purposes confirm that the statute addresses "arbitrary" age discrimination through its prohibitions and addresses other problems facing older workers—including the disproportionate effects of neutral practices—through education, training, and other manpower programs. *See Sutton v. United Air Lines, Inc.* 527 U.S. 471, 484 (1999) (looking to statutory findings to interpret statutory scope).

B. The Legislative History Confirms That Disparate Impact Claims Are Not Cognizable

The legislative history confirms that ADEA disparate impact claims are not cognizable. As counsel for one of petitioners' *amici* has written, "[t]he legislative history of the ADEA is a model of lucidity," and it "drives the reader to the conclusion that 'intent' to discriminate on the basis of age was the gravamen of age discrimination and that actions which have 'adverse effect' on older workers were not to be considered illegal." Alfred W. Blumrosen, *Interpreting the ADEA: Intent or Impact*, in *Age Discrimination in Employment Act: A Compliance and Litigation Manual for Lawyers and Practitioners* 73 (Monte B. Lake, ed. 1983) [hereinafter "Blumrosen, *Interpreting the ADEA: Intent or Impact*"].

In passing Title VII, Congress "did not yet have enough information to make a considered judgment about the nature of age discrimination." *EEOC v. Wyoming*, 460 U.S. at 229. It therefore directed the Secretary of Labor to study the issue and make "such recommendations for legislation to prevent arbitrary discrimination in employment because of age as he determines advisable." Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, § 715, 78 Stat. 265 (1964).

In his June 1965 report, the Secretary discussed "the entire range of factors which tend to have adverse effects on the employment of older workers." J.A. 360. The Secretary found that, unlike race discrimination, age discrimination is not based upon animus or other "feelings about people entirely unrelated to their ability to do the job." J.A. 355; *see also id.* ("There is *no* significant discrimination of this kind so far as older workers are concerned."). Instead, the Secretary found that "[t]he most obvious kind of age discrimination in employment takes the form of employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." J.A. 364. This form of intentional discrimination, the Secretary noted, is what Congress meant by "arbitrary discrimination." J.A. 355.

To be sure, the Secretary found that the "force of certain circumstances," such as health problems, historically lower levels of educational attainment, and technological changes, "affect older workers more strongly, as a group, than they do younger workers." J.A. 378-89. He also found that certain institutional arrangements such as pension and benefit plans could adversely affect older workers, sometimes by leading employers to refuse to hire older workers. J.A. 356, 389-97.

But the "firmest conclusion" from his study was that "the most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary' . . . ." J.A. 403. The

Secretary therefore recommended that arbitrary age discrimination be prohibited, J.A. 404-06, but that institutional arrangements and neutral practices disadvantaging older workers be addressed through pension reforms, J.A. 406-07, counseling, job placement, and job training programs, J.A. 407-11, and a system of continuing education, J.A. 412-16.

On January 23, 1967, the Secretary transmitted to Congress proposed legislation, entitled "Age Discrimination in Employment Act of 1967." Letter from W. Willard Wirtz to Hon. John W. McCormack and Hon. Hubert H. Humphrey, Jan. 23, 1967, *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 62-63 (1981) [hereinafter "*EEOC Legislative History*"]. The Secretary informed Congress that "[t]he prohibitions of the legislation would be directed to arbitrary discrimination . . . ." *Id.* at 62. Importantly, the Secretary noted that, while the proposed bill "provides for attention to be given to institutional arrangements which work to the disadvantage of older workers," "[r]easonable differentiations not based solely on age . . . would not fall within the proscription" of the legislation. *Id.* at 62-63. Rather, "research would be undertaken and promoted with a view to reducing barriers to the employment of older workers." *Id.* at 63.

In Senate testimony, the Secretary explained that his bill was directed only at "the 'unjust'" or "'arbitrary' . . . discrimination . . . which may be made in the absence of any legitimate relevance between age and employment capacity." *Hearings on S. 830 Before the Subcomm. on Labor of the Senate Subcomm. on Labor and Public Welfare*, 90th Cong. 37 (1967) (quotations omitted). He indicated that, where there was such "legitimate relevance," even "differentiations or distinctions" made on the basis of age were permitted. *Id.* This limitation, the Secretary explained, was "identified specifically in Section 2(b)" of the bill and "reflected particularly in Section 4(f)," which, among other things, reaffirmed that there was no violation "*where age is a bona*

fide occupational qualification" or "*where the differentiation is based on reasonable factors other than age.*" *Id.* at 39 (emphasis in original). The Secretary so testified in the House as well. *See Hearings on H.R. 3651, H.R. 3768, & H.R. 4221 Before the General Comm. on Labor of the House Comm. on Education and Labor*, 90th Cong. 8 (1967).

The Secretary's proposed bill was enacted into law. *See EEOC Legislative History* at 173. Both committee reports acknowledge that the bill reflects the Secretary's proposals. *See id.* at 74-75, 106. Moreover, the findings and purposes in Section 2 were enacted as the Secretary proposed, as were the education and research programs in Section 3, the prohibitions in Section 4(a), and the RFOA provision in Section 4(f)(1). *Compare id.* at 8 *with* 81 Stat. 602-04.

This legislative history cannot be reconciled with reading the ADEA as providing for a disparate impact doctrine. The Secretary's sweeping inquiry into "the entire range of factors tending to have adverse effects" on older workers directly encompassed neutral practices having adverse effects. But the Secretary explained that such practices were not even properly called "discrimination." J.A. 355. Moreover, the Secretary recommended that only "arbitrary" age discrimination—that is, unjustified intentional discrimination—be prohibited and that other problems facing older workers be dealt with through education, reform, and programmatic measures such as job placement and training. As Congress enacted the very language the Secretary proposed, there is no basis for inferring that Congress had a different intent. *Accord EEOC v. Wyoming*, 460 U.S. at 230-31.

C. The Disparate Impact Doctrine Is Incompatible With The ADEA

Although the text and legislative history are wholly dispositive of the question presented, there are also important structural reasons for not construing the ADEA to recognize disparate impact claims. The *Griggs* disparate impact doctrine

is immensely complicated and, in many respects, has confounded courts. *See, e.g., Watson*, 487 U.S. at 995-97 & n.3 (discussing lack of judicial consensus on, for example, the standard for determining whether a disparity is "substantial"); Michael Gold, Griggs' *Folly: An Essay on the Theory, Problems, and Origin of the Adverse Impact Definition and a Recommendation for Reform*, 7 Ind. Rel. L. J. 429, 439-66 (1985) (discussing multiple problems confronting courts). These problems multiply exponentially in the context of the ADEA and show that disparate impact claims are not functionally compatible with the ADEA.

1. In Title VII cases, disparate impact claims have traditionally been tried to courts, not juries. Indeed, in 1991, when Congress authorized jury trials under Title VII, it expressly excluded disparate impact claims from that authorization. *See* 42 U.S.C. § 1981a(a)(1) & (c).

In contrast, this Court has held that ADEA claims are subject to jury trial. *See Lorillard v. Pons*, 434 U.S. 575, 585 (1978). Moreover, Section 7(c) of the ADEA was amended to provide that "a person shall be entitled to a trial by jury of any issue of fact in any such action . . . regardless of whether equitable relief is sought by any party in such action." 29 U.S.C. § 626(c)(2). Accordingly, where ADEA disparate impact claims have been allowed, those cases have been tried to juries. *See, e.g., Allen v. Entergy, Inc.*, 193 F.3d 1010, 1013-15 (8th Cir. 1999); *AFSCME, Dist. Council 37 v. New York City Dep't of Parks & Recreation*, 113 F.3d 347, 354-56 (2d Cir. 1997); *Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 547 (9th Cir. 1983), *aff'd on other grounds*, 472 U.S. 400 (1985).

"[T]he very different remedial and procedural provisions under the ADEA suggest that Congress had a very different intent in mind in drafting the later law." *Lorillard*, 434 U.S. at 585 n.14. Factual questions about discriminatory intent are "typical grist for a jury's judgment." *Teamsters v. Terry*, 494

U.S. 558, 583 (1990) (op. of Stevens, J.). But the complex evaluative judgments made in disparate impact cases—about, *e.g.*, differential rates of selection, validity of selection practices, and effective alternative selection practices—plainly are not. *See* Mack A. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?*, 14 U. Toledo L. Rev. 1261, 1272 (1983) [hereinafter "Player, *Title VII Transplant*"]; Douglas Herbert & Lani Shelton, *A Pragmatic Argument against Applying the Disparate Impact Doctrine in Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 652-56 (1996). Moreover, since there is a lack of consensus about applicable legal standards, "the jury instructions that they will be given will be difficult, if not impossible, to follow." *Id.* at 657.

In short, the "practical abilities and limitations of juries" could actually "impair the functioning of [a] legislative scheme" that provides for disparate impact claims. *Granfinanciera v. Nordberg*, 492 U.S. 33, 42 n.4 (1989) (quotation omitted). This strongly suggests that the ADEA does not contemplate disparate impact claims. *Cf. Price Waterhouse*, 490 U.S. at 292 (Kennedy, J., dissenting) ("most acute" potential for jury confusion is a reason not to recognize a claim).

2. Furthermore, in Title VII cases, disparate impact claims are almost always pursued as class actions under Rule 23(b)(2). Because such claims challenge practices generally applicable to all in a group and can be remedied by common equitable relief, disparate impact cases under Title VII are among the "prime examples" of cases where individualized notice and an opportunity to opt out of a class are neither necessary nor appropriate. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998).

In contrast, Rule 23(b)(2) does not apply to ADEA claims. Such claims are subject to the "opt-in" procedures established in 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

While these "opt-in" procedures allow age discrimination plaintiffs to group their resources and achieve economies of scale, they do not allow "representative" actions, much less ones without notice or an opportunity to opt out. *See Hoffmann-LaRoche, Inc. v. Sperling*, 493 U.S. 165, 170, 173-74 (1989). Thus, there is no mechanism for ensuring class-wide participation in disparate impact claims; the courts have no power to bind all affected to common equitable relief; and "repetitive" litigation imposing potentially inconsistent obligations is quite possible. Player, *Title VII Transplant* at 1272-73. These procedural differences add to the showing that the ADEA is ill-suited for, and thus is not to be reasonably construed to contemplate, disparate impact claims.

3. It is also unclear how properly to evaluate an ADEA disparate impact claim. Even acknowledging the complication of multi-racial blood lines, race, sex, national origin, and religion are basically dichotomous variables. Thus, in Title VII cases, assessing the effects of a selection practice on blacks versus non-blacks, Hispanics versus non-Hispanics, females versus males, *etc.*, is relatively straightforward.

The same is not true for ADEA cases, since "age is a continuum." *Goldstein v. Manhattan Indus., Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985). While the statute covers all individuals age 40 and over, it also applies when the alleged discrimination is in favor of "substantially younger" individuals who are age 40 or over. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 313-14 (1996). "[I]mpact analysis that works well with finite classes like race and sex does not quite fit with a fluid, continuum concept such as age." Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That Is the Question & Some Thoughts on Impact Analysis under the Age Discrimination in Employment*

Act, 31 U. Rich. L. Rev. 819, 829 (1997) [hereinafter "Player, *Impact Analysis Under the ADEA*"].

One possible approach would allow plaintiffs to specify the applicable groupings on a case-by-case basis (*e.g.*, workers age 55 and over versus those under age 55, age 50 and over versus under age 50, *etc.*). However, such an approach is subject to gross manipulation and provides no standards to employers for self-examination and voluntary compliance. *See Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371-73 (2d Cir. 1989); *Ellis*, 73 F.3d at 1009; Player, *Impact Analysis Under the ADEA* at 829-30. Indeed, under this view, "an 85 year old plaintiff could seek to prove a discrimination claim by showing that a hiring practice caused a disparate impact on the 'subgroup' of those age 85 and above, even though all those hired were in their late seventies." *Lowe*, 886 F.2d at 1373.

A less manipulable approach compares the effects of a selection practice on individuals age 40 and over to its effects on those under age 40. *See Lowe*, 886 F.2d at 1371-73. But this more categorical approach is in tension with this Court's observation that the ADEA "prohibits discrimination on the basis of age and not class membership." *O'Connor*, 517 U.S. at 313. Thus, other courts have rejected the over age 40/under age 40 approach. *See* Philip J. Pfeifer *et al.*, *Lindeman & Grossman's Employment Discrimination Law* 367 & n.174 (3d ed. Supp. 2000) (noting cases and disagreement).

Moreover, neither of these approaches solves the problem posed by the transient nature of age. Age is not merely a continuous variable; it is also a changing one. An individual not covered by the ADEA at age 39 becomes protected by the statute the next year; and an individual under age 40 (or age 50 or age 55 or age 60) may age sufficiently to move into a different comparison group over the course of litigation. Thus, "[t]he attempt to define 'aged persons' as all persons over 40 makes sense as an effort to wipe out specific age

limits, but not as creating a 'protected class' like race or sex, precisely because of the transient composition of the group." Blumrosen, *Interpreting the ADEA: Intent or Impact* at 104.

4. For related reasons, there are also substantial questions about the legal relevance of the disproportionate effects that might be measured in an age case. Although it may be idealistic in the extreme, *see Watson*, 487 U.S. at 992 (op. of O'Connor, J.), a working assumption of Title VII law is that, "absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired." *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299, 307 (1977). Based on this assumption (that interest, as well as skills and performance, are not inherently different by race, gender, or religion), the disparate impact doctrine requires a special justification for any selection practice with substantial disparate effects on otherwise similarly situated persons. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In contrast, "statistics showing a deviation from such a 'norm' would not prove anything in the ADEA context . . . ." Blumrosen, *Interpreting the ADEA: Intent or Impact*, at 110. It is in the nature of labor markets that those who enter or remain tend over time to be younger than those who leave. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307, 312-13 n.4 (6th Cir. 1975). Moreover, as this Court has recognized, "physical ability generally declines with age." *Mass. Bd. of Retir. v. Murgia*, 427 U.S. 307, 317 (1976). In addition, because the payback period is shorter, older persons have less incentive than younger persons to invest in human capital and, accordingly, tend statistically to have more dated and less valuable technological skills and/or education. *See* Richard A. Posner, *Aging and Old Age* 51-58 (1995). Furthermore, "mental capacity sometimes diminish[es] with age." *Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991); *see generally* Douglas

H. Powell, *Profiles in Cognitive Aging* 68-89 (1994). Finally, while age frequently brings with it more experience and wisdom, *see* Posner, *supra*, at 105-06, as much research confirms, in many occupations and professions, age is negatively correlated with needed skills, performance, and interest. *See, e.g., id.* at 72-78, 115-17, 358-60. Consequently, "'non-age factors having differential age-specific impacts'" are likely to be "'ubiquitous and inescapable.'" *Cunningham v. Cent. Beverage, Inc.*, 486 F. Supp. 59, 62 (N.D. Tex. 1980) (quoting Peter H. Schuck, *The Graying of Civil Rights Law: the Age Discrimination Act of 1975*, 89 Yale L.J. 27, 65 (1979)).

Indeed, as the Secretary noted in his report, J.A. 392-97, some neutral practices adversely affect older workers precisely because employers have previously treated older workers better than younger workers. For example, "virtually all elements of a standard compensation package are positively correlated with age." *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164 (7th Cir. 1992). Thus, salary caps in payroll systems (such as those employed by federal and state governments) adversely affect the annual percentage pay increases statistically available for older workers. *See EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 743 (E.D. Pa. 1985). Moreover, in tough times, across-the-board cuts in, for example, wages and/or vacation leave have disproportionate effects on older workers. *Finnegan*, 967 F.2d at 1165. And a decision to "close a plant or curtail its operations on the basis of high wage costs" will do so as well. *Metz*, 828 F.2d at 1214 (Easterbrook, J., dissenting).

In short, in contrast to the working assumption in Title VII cases, it is to be expected that many sound and efficacious work and selection practices will have a disproportionate impact on older workers—*e.g.*, in physically demanding jobs, in jobs requiring cutting-edge computer skills, *etc.* Since such adverse effects are so predictable and yet so unavoidable, it is not appropriate to equate a showing that a facially-neutral

practice has a disparate impact on older workers with a *prima facie* case of employment discrimination and in effect "force employers to carry the burden of justifying all of their work and selection standards." Player, *Impact Analysis Under the ADEA* at 830. That many of the work and selection standards would survive scrutiny is no basis for allowing challenges to be based on so little in the first instance. *See City of Cleburne v. Cleburne Living Cent., Inc.*, 473 U.S. 432, 444 (1985). Moreover, given the costs and risks of litigation generally, allowing such challenges (especially in jury trials) would impose such burdens on employers that they would predictably be forced to either abandon sound work and selection practices—particularly those that are not subject to precise evidentiary verification—and/or overlay quotas onto those selection practices. *See Watson*, 487 U.S. at 993 (op. of O'Connor, J.); *Connecticut v. Teal*, 457 U.S. 440, 463 (1982) (Powell, J., dissenting). There is no "convincing evidence" that Congress intended such consequences from this measured legislation, much less that it intended to depart from the traditional conception of discrimination where unlawful intent is required.

II. *GRIGGS* AND ITS PROGENY UNDER TITLE VII DO NOT COMPEL RECOGNITION OF DISPARATE IMPACT CLAIMS UNDER THE ADEA

As the court below noted (Pet. App. 5a-6a), the majority of circuits to address the issue have held that disparate impact claims are not cognizable under the ADEA. As Judge Greenberg has further noted, the courts holding to the contrary have not "even purported to conduct an analysis of the issue" (*DiBiase*, 48 F.3d at 733 n.20); indeed, the seven cases cited by petitioners (Pet. Br. at 5) devote a combined total of nine sentences to it. The sole rationale offered is that *Griggs* and its progeny construe a prohibition in Title VII worded similarly to the ADEA prohibition to allow such claims. This rationale cannot withstand scrutiny.

A. Disparate Impact Claims Are Not Recognized Where Statutory Provisions Foreclose Them

In the context of Title VII, *Griggs* and its progeny do not interpret Section 703(a) as generating a generally applicable disparate impact doctrine, but rather as generating a more limited doctrine that applies where Title VII as a whole does not demonstrate that only disparate treatment claims will lie. The Court has been careful to say that disparate impact claims will lie only "in some circumstances" (*Gen. Elec. v. Gilbert*, 429 U.S. at 136-37), and only "in certain cases" (*Watson*, 487 U.S. at 986-87, 988). The Court, for example, has declined to decide whether disparate impact claims lie under Section 703(a)(1), the provision applicable to discriminatory discharge claims like those asserted by petitioners. *See Nashville Gas Co. v. Satty*, 434 U.S. 136, 144-45 (1977). Moreover, noting that "[e]ven a completely neutral practice will inevitably have *some* disproportionate impact on one group or another," the Court has added that "*Griggs* does not imply, and this Court has never held, that discrimination must always be inferred from such consequences." *Los Angeles v. Manhart*, 435 U.S. 702, 710-11 n.20 (1978) (emphasis in original).

Of particular significance for present purposes, the Court has made it clear that, when Section 703(a) is read in light of and in conjunction with Section 703(h), no Title VII disparate impact claim will lie against a bona fide seniority system. Section 703(h) makes it lawful to "apply . . . different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, . . . provided that such differences are not the result of an intention to discriminate . . . ." 42 U.S.C. § 2000e-2(h). This Court has held that, "[u]nder § 703(h), the fact that a seniority system has a discriminatory impact is not alone sufficient to invalidate the system; actual intent to discriminate must be proved." *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 65, 69 (1982).

Likewise, the Court has suggested that the Bennettt Amendment to Title VII, which allows wage differentiations "authorized by the provisions of section 206(d) of title 29," 42 U.S.C. § 2000e-2(h), precludes disparate impact claims for gender-correlated wage disparities. *See County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). Similarly, the Court has held that a disparate impact claim by male employees against a gender-neutral pension plan would be barred by 29 U.S.C. § 206(d), which makes lawful compensation disparities based on "any other factor other than sex." *See Manhart*, 435 U.S. at 710-11 n.20.

Like Section 703(h) and 29 U.S.C. § 206(d) in their particular areas of application, Section 4(f)(1) of the ADEA makes discriminatory intent determinative and, in its instance, does so on a statute-wide basis. The conclusion that follows from disparate impact doctrine developed under Title VII itself is that disparate impact claims do not lie under the ADEA.

B. There Are Substantial Reasons Not To Carry *Griggs'* Title VII Construction Over To The ADEA

As a more general matter, the Court should decline to carry *Griggs'* construction of Title VII over to the ADEA. The ADEA is an entirely separate statute from Title VII, with its own text, structure, history, and purposes. The Court has not hesitated elsewhere to construe the ADEA independently and differently than Title VII. *See, e.g., EEOC v. ARAMCO*, 499 U.S. 244, 256 (1991) (ADEA but not Title VII applies outside of United States); *Lorillard*, 434 U.S. at 583-84 (ADEA but not Title VII allows jury trials). Moreover, while the Court has noted that "the prohibitions of the ADEA were derived *in haec verba* from Title VII," *e.g., id.* at 584, the Court has also declined, for example, to decide whether the *McDonnell Douglas* framework applies in ADEA cases. *See, e.g., Reeves*, 530 U.S. at 142; *O'Connor*, 517 U.S. at 311. And, in every case, the Court has examined *de novo* whether Title VII

precedent is appropriately applied to the ADEA's distinct scheme. *See, e.g., Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 109-14 (1991); *Oscar Meyer & Co. v. Evans*, 441 U.S. 750, 756-58 (1979). Here, "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." *Hazen Paper*, 507 U.S. at 618 (Kennedy, J., concurring).

To start, there is no basis for presuming that the 1967 Congress, by using Section 703(a)'s language in Section 4(a) of the ADEA, intended to provide for ADEA disparate impact claims. The construction of Section 703(a) as providing for disparate impact claims cannot conceivably be characterized as one that reflected "a well-known meaning at common law or in the law of this country" at the time of the ADEA's enactment. *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911). *Griggs* was not even decided until four years after the ADEA's enactment in 1967. Moreover, in 1967, the prevailing conception was that anti-discrimination provisions like ADEA required proof of discriminatory intent; indeed, scholars and petitioners' own *amici* have documented that, as of 1967, the "disparate impact" doctrine stated in *Griggs* had not yet been formulated by any court, enforcement agency, or even academic literature. *See, e.g.*, Blumrosen, *Strangers in Paradise*, at 70-71; Blumrosen, *Interpreting the ADEA: Intent or Impact* at 95; Gold, *supra*, at 518-20; Cornell AAUP Br. at 2, 22-24.

Nor is the construction of Section 703(a) in *Griggs* and its progeny determinative of Section 4(a)'s meaning. To accept this point, one need not agree with critics who have argued that "*Griggs* perverted both the language and the legislative history of the act." Richard A. Epstein, *Forbidden Grounds* 197 (1992). *See also* Nelson Lund, *The Law of Affirmative Action in and after the Civil Rights Act of 1991: Congress Invites Judicial Reform*, 6 George Mason L. Rev. 87, 91-101 (1997); Gold, 7, *supra*, at 479 n.170. Rather, one need only accept that the language of Section 703(a), and thus of Section

4(a), can *also* be construed as only providing for intentional discrimination claims, particularly when read in light of other statutory provisions (such as Section 4(f)(1)). As explained above (*see supra* pp. 7-9), this alternative construction is plainly reasonable, and has in fact been embraced by Justices of this Court. *See Connecticut v. Teal*, 457 U.S. at 456-57 (Powell, J., joined by Chief Justice Burger, then-Justice Rehnquist, and Justice O'Connor, dissenting) ("Although this language suggests that discrimination occurs only on an individual basis, in *Griggs* . . . the Court held that discriminatory intent on the part of the employer . . . need not be shown . . . [and] that the 'disparate impact' of an employer's practices . . . can violate § 703(a)(2) of Title VII."). In other words, the construction of Section 703(a)(2) in *Griggs* and its progeny is not a necessary construction of those words wherever and whenever they appear; and, consequently, the proper construction of Section 4(a) of the ADEA, like the proper construction of any statutory provision, is to be determined by separately examining the ADEA's structure, history, purposes, and context. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000).

The salient point in this regard is that *Griggs* and its progeny do not purport to derive the Title VII disparate impact doctrine solely from the text of Title VII itself or, for that matter, as a necessary construction of Section 703(a)(2)'s language. Indeed, a review of the cases in fact reveals very little examination of the text at all. Rather, as courts and commentators have noted, in interpreting Section 703(a)(2) of Title VII to provide for the disparate impact doctrine, *Griggs* and its progeny "looked primarily to the larger objectives underlying Congress' enactment of Title VII." *Ellis*, 73 F.3d at 1007 n.13. *Accord DiBiase*, 48 F.3d at 733 (op. of Greenberg, J.); Michael C. Sloan, *Disparate Impact in the Age Discrimination Employment Act*, 1995 Wis. L. Rev. 507, 517 (1995).

In analogous circumstances, this Court has indicated that it will construe two similarly worded statutory texts differently if the policy objectives relied upon in construing one statute do not fully extend to the other statute. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 522-24 (1994) (declining to extend "prevailing party" analysis of *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), to identical language in Copyright Act, 17 U.S.C. § 505, because goals of the relevant statutes were "not completely similar"). That is most emphatically the situation here.

Griggs was concerned that "childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their life." *McDonnell Douglas*, 411 U.S. at 806. Similarly, *Dothard v. Rawlinson*, 433 U.S. 321, 329-32 (1977), was concerned that women, another class historically subject to invidious discrimination, could cumulatively suffer from actions based on largely immutable characteristics. But, as this Court has observed, "unlike . . . those who have been discriminated against on the basis of race or national origin," or gender, older persons as a class "have not experienced a 'history of purposeful unequal treatment,' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Murgia*, 427 U.S. at 313; *accord Kimel*, 120 S. Ct. at 645. Moreover, where older workers (who of course were once young) are concerned, the lack of a diploma, test score, or skill "cannot be viewed as a product of lifelong discrimination." Krop, *supra*, at 850. Older workers as a class have not been educated in segregated schools, been subject to Jim Crow laws, or been barred from certain workplaces entirely. Rather, as the Secretary reported, for older workers, the issue is usually not the denial of skills or opportunity in the first instance, but rather the deterioration of skills and performance (which, as discussed above, is

generally but unevenly correlated with advancing age). *See supra* pp. 17, 24-25.

The Court has suggested that disparate impact doctrine is also concerned with the "problem of subconscious stereotypes and prejudices . . . that Title VII was enacted to combat." *Watson*, 487 U.S. at 990. But "the kind of 'we-they' thinking that fosters racial, ethnic, and sexual discrimination is unlikely to play a large role in the treatment of the elderly worker," "because the people who do the hiring and firing are generally as old as the people they hire and fire and are therefore unlikely to mistake those people's vocational abilities." Posner, *supra*, 320-21. Consistent with this observation, the Secretary reported that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination," *EEOC v. Wyoming*, 460 U.S. at 231; J.A. 355, 362-63, where prejudices having no relation to employment may cause unfair and erroneous judgments. *See Murgia*, 427 U.S. at 313. Rather, the Secretary found that age discrimination in employment results from generalizations about work abilities that may not be applicable to particular individuals. J.A. 355, 361-78. Accordingly, *Hazen Paper* determined that, "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age . . . ." 507 U.S. at 611 (emphasis in original).

The policies motivating Title VII's disparate impact doctrine thus do not apply in the context of the ADEA's different and more limited objectives. When the *Watson* Court indicated "that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination," *Watson*, 487 U.S. at 987, it was referring to employment practices of concern to Title VII—specifically, those that perpetuate historical deprivations or that potentially allow deep-rooted animus to operate. Since older workers do not suffer from

historical deprivations or deep-rooted animus, disparate treatment doctrine fully protects their interests under the ADEA. That is the teaching of *Hazen Paper*.

The sum of the matter is that the construction of Title VII in *Griggs* and its progeny as providing for disparate impact claims is derived from, and is circumscribed by, Title VII's overall structure, history, and purposes. As such, it is not a construction that can or should govern the ADEA, whose overall structure, history, and purposes are markedly different from those of Title VII.

III. THE ARGUMENTS OF PETITIONERS AND THEIR *AMICI* FOR RECOGNIZING DISPARATE IMPACT CLAIMS ARE WITHOUT MERIT

Petitioners do little to defend the appellate cases that have carried Title VII's disparate impact doctrine over to the ADEA. Moreover, they make no effort to satisfy Title VII's requirement (*see Wards Cove Packing v. Atonio*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B)) that the specific practice causing the purported disparate impact be identified (and instead continue to assert (Pet. Br. 16, 43) a claim based on gross percentage statistics that even the concurring judge below found legally deficient). Rather, with their *amici*, petitioners advance a series of arguments that no court has adopted for recognizing ADEA disparate impact claims. These arguments are without merit.

A. Petitioners' Suggestion That Section 4(a)(2) Cannot Properly Be Construed To Have An Intent Requirement Is Unfounded

Contrary to the suggestion of the two student notes upon which petitioners rely (Pet. Br. at 13, 18), Section 4(a)(2) is easily read to provide for a discriminatory intent requirement; the section applies only to actions taken "because of" age, which is a traditional statement of an intent requirement. *See supra* p. 8. Nor does the omission of the word "discriminate"

from Section 4(a)(2) suggest otherwise. Section 4(a)(2) is merely one of many provisions in the Age *Discrimination* in Employment Act, which under traditional concepts would as a whole apply only to intentionally discriminatory acts. *See supra* pp. 7-8.

Petitioners also err in suggesting (Pet. Br. 18, 20-22) that the "adversely affect" language in Section 4(a)(2) must be read to embrace disparate impact claims so as to preserve linguistic coherence. As pointed out above (*see supra* p. 9), petitioners' construction ignores both the analogous structure of Section 4(a)(1) and the comma between the "adversely affect" and the "because of" language in Section 4(a)(2) that makes any junction between the two grammatically incorrect. *Cf. United States v. Ron Pair Enterp.*, 489 U.S. 235, 241 (1989) (holding that commas prevent junction of language in 11 U.S.C. § 506(b)). Moreover, it is petitioners' reconstruction that creates a "lack of linguistic agreement" (Pet. Br. 21) by wrongly moving the "because of" language from its proper position at the end of the provision to the beginning. While perhaps inelegant, it is linguistically proper for the "because of" language to (i) modify the employment practices at issue (*i.e.*, "to limit, segregate, or classify his employees") and yet, at the same time, (ii) apply only where a practice injures an "individual" in the statutorily specified way. Indeed, rather than reflecting a non-intent-based doctrine, the structure of Section 4(a)(2) plainly reflects its parallel to the similar provision applicable to labor organizations. *See* 29 U.S.C. § 623(c)(2) (it is "unlawful for a labor organization . . . to limit, segregate, or classify its membership . . . in any way which would deprive or tend to deprive any individual of employment opportunities . . . , because of such individual's age.").

Petitioners further err in suggesting (Pet. Br. 19 n.10) that construing Sections 4(a)(1) and 4(a)(2) as both containing an intent requirement makes those provisions redundant. For example, Section 4(a)(2) adds to Section 4(a)(1) by covering

all intentionally discriminatory segregation or classification, whether or not differentiating the terms and conditions of employment, including segregation in apprenticeship and other joint union-employer programs covered by the similarly worded prohibition against union discrimination in Section 4(c)(2). Beyond that, Section 4(a)(2) is a general catch-all provision covering intentional discrimination not covered by Section 4(a)(1).

Finally, petitioners contend (Pet. Br. 24-27) that the phrase "because of" in (both) Sections 4(a)(1) and 4(a)(2) cannot be a reference to a discriminatory intent requirement, since the phrase "based on" in Section 4(f)(1)'s RFOA provision implicates an intent requirement (when combined with the "reasonable factors" language). But there is no canon of construction which suggests that two synonymous phrases in two different passages of a statute cannot have similar meanings. On the contrary, the "plain language" canon counsels that statutory words, including synonyms, be given their ordinary and, if appropriate, comparable meanings. *See, e.g., Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, the phrases "because of" and "based on reasonable factors" may both properly connote an intent requirement.

B. Disparate Impact Doctrine Is Not Necessary To Give Meaning And Effect To The RFOA Provision

Contradicting their concession (Pet. Br. 26-27) that, when combined with the phrase "reasonable factors," the phrase "based on" refers to intent, petitioners next argue (Pet. Br. 13-15, 23-29, 42-43) that the RFOA provision has meaning and effect only if unintentional conduct is actionable and the employer has the burden of proving that its conduct is legally justifiable. This argument fails at every turn.

1. Contrary to petitioners' premise (Pet. Br. 13-14, 24-25, 28), recognition of ADEA disparate impact claims is not necessary to give the RFOA provision meaning and effect. As discussed above (*see supra* pp. 10-14), the RFOA provision

substantively defines an employer's rebuttal burden in "pretext" and "mixed-motive" cases; and it also affirmatively clarifies "that employers [a]re permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. The RFOA provision thus does not need an ADEA disparate impact doctrine to give it full meaning and effect.

2. Petitioners' RFOA argument also assumes (Pet. Br. 13, 15, 23-29, 31-34, 42-43) that the RFOA provision is an affirmative defense upon which an employer bears the burden of proof. This assumption is both irrelevant and erroneous.

a. Whether or not the RFOA provision states an affirmative defense, it confirms that the ADEA is a disparate treatment statute. The disparate impact doctrine provides for imposition of liability without a finding of discriminatory intent. By confirming that intent is outcome-determinative under the ADEA, the RFOA provision confirms that there is no room in the ADEA for disparate impact claims where intent is irrelevant. Petitioners have nothing to say on this point.

b. The RFOA is not an affirmative defense upon which the burden of proof shifts. As noted above (*see supra* pp. 10-11), the federal courts of appeals have repeatedly said that the provision does not shift the burden of proof.

Petitioners also fail to acknowledge that the RFOA provision is part of a section of "lawful employment practices," a code heading that has been statutorily enacted. *See* 104 Stat. 978. In contrast to the BFOQ provision of the ADEA (or the later added foreign workplaces provision), which sanctions an aspect of intentional age discrimination, the office of the RFOA provision is to clarify that actions based on reasonable considerations other than age are lawful. Section 4(f)(3) does much the same thing in clarifying that actions based upon good cause are lawful. In employment laws at least, such clarifying provisions are typically *not* treated as affirmative defenses that shift the burden of proof. *See, e.g., Lorance v. AT&T Tech., Inc.*, 490 U.S. 900, 908

(1989); *Steelworkers v. Weber*, 443 U.S. 193, 205-07 (1979). Indeed, in *Betts*, this Court held that even Section 4(f)(2), which allowed the express use of age in benefit plans, was definitional and did not constitute an affirmative defense. *See Betts*, 492 U.S. at 181. In this context, the RFOA provision is not properly treated as an affirmative defense either, as the lower courts have held.

Contrary to petitioners' argument (Pet. Br. 31, 32), the statutory phrase "otherwise prohibited" does not assume that "a violation has already occurred" and require that the RFOA provision be treated as an affirmative defense. The statutory phrase is "otherwise prohibited," not "prohibited." The word "otherwise" means "in other respects." *Webster's Third New Int'l Dictionary* 1598. Accordingly, the phrase "otherwise prohibited" at most means that liability may be imposed only if there is nothing else. The phrase "otherwise prohibited" does not necessarily introduce an affirmative defense, because it does not resolve whether the plaintiff or the defendant has the burden of proof on the additional considerations affecting liability.

For example, termination of a 39-year-old employee on the basis of age could be seen as "otherwise prohibited" by Section 4(a) of the ADEA, because there would be liability absent the age limit set forth in 29 U.S.C. § 631(a); but petitioners cannot seriously question that an ADEA plaintiff has the burden of proof on the threshold fact that the plaintiff is age 40 or older. Likewise, under *McDonnell Douglas* and its many progeny, once the *prima facie* case is made, the employment action could be seen as "otherwise prohibited," since a directed verdict will be entered for the plaintiff unless the defendant produces evidence of a legitimate nondiscriminatory reason for the action; nevertheless, the ultimate burden of persuasion does not shift. *See Reeves*, 530 U.S. at 142-43. Similarly, although discrimination on the basis of race is unlawful, this Court has held that such "otherwise prohibited" actions are lawful if taken pursuant to

a valid affirmative action plan; and the burden of proving the invalidity of the affirmative action plan remains with the employee-plaintiff. *See Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 626-27 (1987). In short, while there clearly are counter-examples where an action is "otherwise prohibited" unless the defendant carries a burden of persuasion on an affirmative defense (*e.g.*, a BFOQ), actions may be "otherwise prohibited" and yet leave the plaintiff with the burden of persuasion on any additional considerations affecting liability.

This understanding of the "otherwise prohibited" language is in fact confirmed by the 1990 amendments to the ADEA. As petitioners note (Pet. Br. 32-33 n.19), at that time, the "otherwise prohibited" language was also included in Section 4(f)(2) of the ADEA. But the 1990 amendments also added that the employer "shall have the burden of proving" the applicability of the amended requirements of that section. 29 U.S.C. § 623(f)(2). The enactment of this express burden of proof provision in conjunction with the "otherwise prohibited" language shows that the "otherwise prohibited" language does not by itself shift the burden of proof. Indeed, the omission of comparable express burden-shifting language in Section 4(f)(1) is another reason for inferring that the burden of proof does not shift under the RFOA provision. *See, e.g., Russello v. United States*, 464 U.S. 16, 23 (1983); *see also United States v. Fausto*, 484 U.S. 439, 453 (1988) ("This classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.").

c. Even if the RFOA is an affirmative defense, it does not follow that the ADEA provides for disparate impact claims. The RFOA provision could be an affirmative defense for "mixed-motive" cases and, by confirming that intent is outcome-determinative, still preclude disparate impact claims.

3. Equally revealing, petitioners cannot give the RFOA provision any cognizable non-intent-based meaning. That is yet another flaw in their argument.

a. Contrary to petitioners' suggestion (Pet. Br. at 15, 42), the RFOA provision cannot properly be equated with the "business necessity" standard referred to in the EEOC's interpretive guidelines. As set forth in those guidelines (29 C.F.R. § 1625.7(d)), a "business necessity" exists only if the provisions of the Uniform Guidelines for Employee Selection are satisfied, including the provisions requiring that a challenged practice be "job related" and that no equally effective alternative practice with less adverse impact be available. *See id.* §§ 1607.3(B), 1607.6(A). There is no dictionary definition or legal precedent that even arguably allows the term "reasonable" to be given such a restrictive meaning, particularly since this Court has long held that the phrase "business necessity," as used in the case law, cannot itself properly be read so restrictively. *See, e.g., Wards Cove*, 490 U.S. at 659; *Watson*, 487 U.S. at 997-99; *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979). Moreover, the clause preceding the RFOA provision in Section 4(f)(1) expressly applies to any "bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). As this Court has declared, a standard "of 'reasonable necessity[' is] not [one of] reasonableness." *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 419 (1985). The EEOC guidelines improperly equate these two distinct standards.

b. Also problematic is petitioners' alternative suggestion (Pet. Br. 15, 42-43) that the RFOA provision be read to embrace the rebuttal burden standard articulated in *Wards Cove*. Under that standard, a challenged practice with adverse impact is unlawful without regard to intent unless it "serves, in a significant way, the legitimate employment goals of the employer." 490 U.S. at 659. But that standard was articulated by the Court as a gloss on Section 703(a)(2) itself.

Thus, to the extent that Section 4(a)(2) is construed to embrace disparate impact claims based on this Court's construction of Section 703(a)(2), petitioners' proposed definition for the RFOA provision, based on *Wards Cove*, is already part of Section 4(a)(2)'s gloss as well. On this view, then, "the reasonable factor clause as interpreted by [petitioners] would be surplusage," *EEOC v. Newport Mesa Unified Sch. Dist.*, 893 F. Supp. 927, 932 (C.D. Cal. 1995).

c. Petitioners err in arguing (Pet. Br. 14, 29-31, 42-43) that *County of Washington v. Gunther*, 452 U.S. 161, and the "any other factor other than sex" provision of 29 U.S.C. § 206(d), require that the RFOA provision be read as setting forth a standard that is "higher" than "age-neutral and bona fide." Petitioners never tell the Court what this "higher" standard is; and *Gunther* and the "any other factor other than sex" provision in no way support construing the RFOA provision to embrace a non-intent-based standard.

While *Gunther* recognized that the Bennett Amendment's incorporation of the Equal Pay Act's fourth affirmative defense into Title VII could preclude a disparate impact claim under Title VII, it did not derive the underlying disparate impact doctrine from the claim-precluding effect of the defense. Rather, the disparate impact doctrine had already been read into the prohibitions of Title VII years earlier in *Griggs*. Nothing in *Gunther* suggests that the Bennett Amendment itself would have provided justification for reading a disparate impact doctrine into Title VII. Thus, *Gunther* does not support using the RFDA provision to read disparate impact doctrine into the ADEA.

Nor does the difference in wording between the RFOA provision and the "any other factor other than sex" provision of the Equal Pay Act provide a basis for reading a disparate impact doctrine into the ADEA (or for defining the RFOA to be a non-intent-based rebuttal standard). Petitioners offer no evidence that, in enacting the RFOA provision, the 1967

Congress looked at the Equal Pay Act or its fourth affirmative defense, much less that the word "reasonable" was used in the RFOA provision to distinguish the Equal Pay Act's fourth affirmative defense (or to otherwise create a non-intent-based standard). They also fail to mention that, in construing the "any other factor other than sex" provision, the Department of Labor in 1965 took the position that the employer must "show[] that there is a reasonable relationship between the amount of [a] differential and the weight properly attributable to the factor other than sex" (29 C.F.R. § 800.115(d) (1965))—an interpretation that leaves no substantive daylight between the Equal Pay Act's fourth affirmative defense and the RFOA provision. Yet, even under this expansive interpretation, the fourth affirmative defense is intent-based; and, by extension, the RFOA provision must be too. *See also EEOC v. J. C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (fourth affirmative defense requires proof that "the factor was adopted for a legitimate business reason and used reasonably and in light of the employer's stated purpose"); *Randolph Cent. Sch. Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting) (discussing circuit split on meaning of fourth affirmative defense in the Equal Pay Act).

4. In the end, petitioners' argument amounts to nothing more than this: if their debatable construction of Section 4(a) is combined with a possible negative inference from the word "reasonable" in Section 4(f)(1), strict adherence to canons of construction creates a "statutory potential" for adding the more far-reaching "disparate impact" doctrine to what is otherwise a disparate treatment statute. Pet. Br. 27. But, like all statutes, the ADEA is not "a Rubik's Cube," *J.E.M. AGSupply, Inc. v. Pioneer Hi-Bred, Int'l, Inc.*, 122 S. Ct. 593, 611 (2001) (Breyer, J., dissenting), and the Court has expressed a healthy skepticism about reading major theories of liability into statutes "through negative inferences drawn from . . . provisions of quite limited effect." *Landgraf v. USI*

Film Prod., 511 U.S. at 259. Even a touch of skeptical scrutiny calls for rejection of petitioners' argument.

Moreover, the Court has stated that "canons are not mandatory rules . . . . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent even overcome their force." *Chickasaw Nation v. United States*, 122 S. Ct. 528, 535 (2001). Here, consistent with canons of interpretation that petitioners do not consider, the RFOA provision clarifies that discriminatory intent is outcome-determinative under the ADEA and that the ADEA is indeed limited to disparate treatment claims. No negative inference need be, or should be, drawn from the reference to "reasonable factors" other than age, particularly since the RFOA provision is much more naturally understood simply to govern substantively "pretext" or "mixed- motive" cases. Indeed, the RFOA provision does not require that the "differentiation[s]" themselves be "reasonable," only that the "factors" (*i.e.*, motives) on which they are based be reasonable; and the term "reasonable" is easily and best read to mean only that the non-age factors are rational, much as the *McDonnell Douglas* line of cases speaks of "legitimate, non-discriminatory reasons" (or the cases under 29 U.S.C. § 206(d) speak of "bona fide" "factors other than sex").

In short, there is no sound negative inference of a disparate impact theory of liability from this intent-based provision, as the statute's text, structure, purposes, and legislative history confirm. In arguing to the contrary, petitioners ask the Court to make too much from too little.

C. Petitioners' Legislative History Arguments Are Also Without Merit

Petitioners' legislative history arguments are no stronger. Contrary to petitioners' suggestion (Pet. Br. 35 n.20), the Secretary of Labor's 1965 report cannot be avoided on the ground that it was "issued seven years before *Griggs*." The

value of the report lies in the fact that its findings provide the foundation for the ADEA as enacted in 1967; the report thereby provides insight into the ADEA's proper reach. The Secretary did not need *Griggs* in order to properly report to Congress about age discrimination in employment; the Secretary studied the issue and in fact found that Title VII and race discrimination—the issues of concern in *Griggs*—were distinguishable. *See supra* p. 17.

Like their *amicus* (AARP Br. at 12-14, 19), petitioners also err in alternatively suggesting (Pet. Br. at 3) that the Secretary's report anticipated *Griggs* in calling for the elimination of neutral practices with adverse impact. While the report noted that certain employment practices (such as generous fringe benefits packages that can make older workers costly to employ) may "unintentionally *lead* to age limits in hiring," the report characterized only the age limits themselves, and not the practices leading to them, as discriminatory. J.A. 356, 392-97, 406 (emphasis added). Moreover, as counsel for one of petitioners' other *amici* has elsewhere conceded, *see* Blumrosen, *Interpreting the ADEA: Intent or Impact* at 79, the report recommended "adjust[ing] institutional arrangements disadvantaging older workers" through further legislation and other reforms, rather than through the prohibition that petitioners and *amicus* urge on this Court. J.A. 404, 406-07; *see supra* pp. 18-19.

Finally, like their *amicus* (AARP Br. at 11-14), petitioners erroneously attempt (Pet. Br. 5) to equate the report's emphasis on "arbitrary discrimination" with the "arbitrary" barriers to employment of racial minorities at issue in *Griggs*, 401 U.S. at 431. The report makes it clear that, in the context of age (as opposed to race), "arbitrary discrimination" only "involves their rejection because of assumptions about the effect of age on their ability to do a job when there is in fact no basis for these assumptions." J.A. 355 (emphasis omitted). This concern is indisputably with intentional discrimination, and not with the neutral practices at issue in *Griggs*.

D. The Interpretive Bulletins Of The DOL And The EEOC Do Not Justify Recognizing Disparate Impact Claims Under The ADEA

Petitioners next seek support from distinct interpretive bulletins issued by the DOL and the EEOC. But these interpretive bulletins do not justify judicial recognition of ADEA disparate impact claims.

1. The DOL's 1968 interpretive bulletin does not construe the ADEA to allow liability to be imposed on a disparate impact theory (and without regard to discriminatory intent). *See* App. 7a-12a. The bulletin does not even address the scope of Section 4(a) and its prohibitions, much less say that Section 4(a) extends to facially-neutral practices with a disparate impact.

Petitioners plainly err in suggesting (Pet. Br. 5, 34-35) that the bulletin's interpretation of the RFOA provision embraced disparate impact doctrine. Disparate impact is not mentioned by the bulletin. On the contrary, the bulletin states, among other things, that: "Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation" (29 C.F.R. § 860.103(b) (1970)); "[t]he clear purpose is to insure that age . . . is not a determining factor in making any decision regarding . . . employment of an individual" (*id.* § 860.103(c)); "[t]he reasonableness of a differentiation will be determined on an individual, case by case basis, not on the basis of any general or class concept" (*id.* § 860.103(d)); and "situations in which an employee test is used . . . will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute" (*id.* § 860.104(b)). This is disparate treatment language.

To be sure, the bulletin provides a number of essentially objective guides that the DOL indicated would be recognized as supporting a "differentiation based on reasonable factors other than age . . . ." 29 C.F.R. § 860.103 (1970). But those guides do not implicitly reflect, much less expressly embrace,

a disparate impact doctrine. Rather, as might be expected in a bulletin that attempts to "provide 'a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it,'" *id.* § 860.1 (quoting *Skidmore v. Swift Co.*, 323 U.S. 134, 138 (1944)), these guides explain what an employer must do to ensure that no enforcement action is initiated by the DOL to challenge a putative "reasonable factor other than age." In other words, as this Court held in construing other provisions of the DOL's interpretive bulletin, these interpretations are "nothing more than a safe harbor, a nonexclusive objective test for employers to use in determining whether they could be certain of qualifying for the . . . exemption." *Betts*, 492 U.S. at 172.

For these reasons, commentators—including commentators relied upon by petitioners—have reported that the original DOL interpretations did *not* embrace the disparate impact doctrine. *See, e.g.*, Blumrosen, *Interpreting the ADEA: Intent or Impact* at 96; Player, *Title VII Transplant* at 1273; Evan H. Pontz, *What A Difference ADEA Makes: Why Disparate Impact Theory Should Not Apply to the Age Discrimination in Employment Act*, 74 N.C. L. Rev. 267, 316 (1995); Donald R. Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA*, 10 Empl. Rel. L. J. 437, 449 (1985). Petitioners' contrary argument is in error.

2. As petitioners note (Pet. Br. 5-6, 36-37), the EEOC interpretations adopted in 1981 do construe the ADEA to embrace disparate impact claims. *See* 29 C.F.R. § 1625.7 (2000). But, consistent with the longstanding position of the DOJ, the Solicitor General has chosen not to defend the EEOC's interpretations. This Court should similarly decline to follow these interpretations, as they inappropriately attempt to revise the statute by administrative fiat.

a. The Court does not owe deference, in the *Chevron* sense, to the EEOC's interpretations. *Chevron* deference is

appropriate only where "the agency interpretation claiming deference was promulgated in the exercise of [congressionally delegated rulemaking] authority." *United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). Here, although the EEOC has substantive rulemaking authority, *see* 29 U.S.C. § 628, it chose to issue its guidelines only as "interpretive rules or statements of policy." Final Interpretations: Age Discrimination in Employment Act, 46 Fed. Reg. 47,724, 47,724 (1981), App. 15a. Moreover, the EEOC did so without complying with the 30-day notice period required for the imposition of substantive rules. *Id; see also* 5 U.S.C. § 553(d). *Chevron* is accordingly inapplicable.

b. The real question is whether the Court owes the EEOC interpretations any "respect" under *Skidmore v. Swift*, the answer to which turns on "the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . . ." 323 U.S. at 140. On these standards the EEOC interpretations deserve no judicial respect.

First, the EEOC interpretations are not consistent with other administrative pronouncements. Instead, they are "at sharp variance with the original interpretation" by the DOL. Blumrosen, *Interpreting the ADEA: Intent or Impact* at 102. Moreover, by seeking to require compliance with the Uniform Guidelines on Employee Selection Procedures, which were jointly issued in 1978 by the DOJ, the DOL, the EEOC, and the Civil Service Commission, the EEOC interpretations conflict with the Uniform Guidelines themselves, which specifically state that they "do not apply to responsibilities under the Age Discrimination in Employment Act." 29 C.F.R. §§ 1607.1(A), 1607.2(D). In addition, the EEOC interpretations conflict with the position that the DOJ has taken in federal court about whether disparate impact claims may be brought under the ADEA. *See, e.g.*, App. 1a-6a, reprinting Brief for Appellant, *Arnold v. Postmaster Gen.*,

Nos. 87-5361 & 87-5362, at 16-20 (D.C. Cir. March 10, 1988) ("The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA.") (emphasis omitted).

Second, the EEOC interpretations were adopted without thorough consideration. They were proposed only months after the EEOC assumed responsibility for enforcement of the ADEA, and long before the EEOC gained any significant experience with the statute. *See* Proposed Interpretations, 44 Fed. Reg. 68,858, 68,858, 68,861 (1979), App. 13a-15a. They were then issued by an acting chairman on behalf of a commission depleted by resignations and burdened by delays in confirmation. *See* Final Interpretations, 46 Fed. Reg. at 47,726, App. 17a; Sarah Fitzgerald, *The Federal Report*, The Washington Post, October 1, 1981, at A27. More importantly, the only justification that the EEOC offered for construing the ADEA to embrace disparate impact claims was a citation to this Court's decision in *Griggs*, which of course dealt only with Title VII, and another to the Sixth Circuit's decision in *Laugesen v. Anaconda Corp.*, 510 F.2d 307, which did not even involve a disparate impact claim. *See* Final Interpretations, 46 Fed. Reg. at 47,725, App. 16a. Incredibly, the EEOC did not even mention—much less analyze—then-Justice Rehnquist's opinion in *Markham v. Geller*, 451 U.S. 945, which was issued in April 1981, several months before the guidelines were published.

Third, not only were the guidelines not thoroughly considered at the time of adoption, the EEOC has chosen to ignore important developments that have occurred since then. Among other things, while the EEOC interpretations embrace a "business necessity" standard incorporating the Uniform Guidelines as the test of "reasonable factors other than age," this Court has repeatedly rejected the restrictive requirements of those guidelines. *See supra* p. 39. In *Betts*, this Court rejected other provisions of these same interpretations as contrary to law. *See* 492 U.S. at 170-72. And in *Hazen*

Paper, in the course of rejecting the EEOC's "proxy" theory of disparate treatment, this Court made it clear that the disparate impact question is still an open one, *see* 507 U.S. at 610; Justice Kennedy wrote a concurring opinion calling into question whether Title VII's disparate impact doctrine is properly carried over to the ADEA, *see id.* at 618; and several federal courts of appeals thereafter reconsidered their own circuit precedent and held that disparate impact claims are not cognizable under ADEA, *see* Resp. Opp. at 10. Yet the EEOC has not even held a hearing on whether its 1981 interpretations should be reconsidered.

Finally, and most fundamentally, the EEOC interpretations are contrary to law. As explained above, the language, legislative history, and structure of the ADEA make discriminatory intent outcome-determinative under this statute. The EEOC's contrary interpretation cannot legally stand against the statute. *See Betts*, 492 U.S. at 171.

E. Disparate Impact Doctrine Was Not Incorporated Into The ADEA By Subsequent Congressional Action (Or Inaction)

Last, along with their *amici*, petitioners contend (Pet. Br. 5-7, 14-15, 37-40) that subsequent congressional acts—most particularly, the Older Workers Benefits Protection Act of 1990 ("OWBPA")—effectively ratified a purported pre-*Hazen Paper* administrative and judicial consensus favoring the disparate impact doctrine. This contention is unfounded.

First, there was no administrative and judicial consensus favoring ADEA disparate impact claims prior to *Hazen Paper*. As noted above, while the EEOC expressed its endorsement of disparate impact claims in 1981, the DOL did not do so during the approximately 12-year period in which it administered the ADEA; and the DOJ expressly took the opposite position in opposing such claims in litigation on behalf of federal agencies. *See supra* pp. 46-47. Moreover, no court of appeals approved such a claim until *Geller v. Markham*, 635 F.2d

1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, and then-Justice Rehnquist instantly set down a prominent opposing marker. *See* 451 U.S. at 946-47. As petitioners have conceded (Pet. 11 n.8), that dissent prompted a substantial, continuing debate in the academic community concerning whether disparate impact claims are properly cognizable under the ADEA. And, while a number of courts may later have "applied, or assumed application of, the Title VII disparate impact model in ADEA cases" (Pet. Br. 5), they did so with little to no analysis, and with continuing judicial disagreement. *See, e.g., Metz*, 828 F.2d at 1220 (Easterbrook, J., dissenting). Against this background, there plainly was no settled understanding for Congress to ratify. *See Fogarty*, 510 U.S. at 532.

Second, disparate impact doctrine is not necessary to, or assumed by, the operation of the OWBPA. The OWBPA imposes certain requirements for a waiver to be "knowing and voluntary" and, in that regard, provides that, "if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees," the employer must provide to the potential releasee certain limited statistical information about the individuals "eligible" and "ineligible" for "such program"—*i.e.*, the waiver program. 29 U.S.C. § 626(f)(1)(H). The OWBPA does not say a word about disparate impact doctrine.

The OWBPA expresses a concern that employees may have "little or no basis to suspect that action is being taken based on their individual characteristics," S. Rep. No. 101-263, at 32 (1990), that "age may have played a role in the employer's decision," and that, before executing a waiver, an employee should at least be "aware of any potential or actual pattern of discrimination." H. Rep. 101-664, at 22-23 (1990). These concerns with the motive for the waiver program, the role that age played in it, and the existence of any pattern of discrimination from the waiver program are the subject of disparate treatment doctrine, not disparate impact doctrine.

See generally McDonnell Douglas, 411 U.S. at 805 (statistical information "may be helpful in disparate treatment cases").

Moreover, since the employer is *not* required to provide any specific statistics about the effects of the different "eligibility factors" used in the waiver program (much less statistics about, *e.g.*, the myriad practices by which employees may have been selected for termination in the first instance), the information required does not even provide a basis for evaluating a potential disparate impact claim. *See Wards Cove*, 490 U.S. at 656-58; 42 U.S.C. § 2000e-2(k)(i)(B). Indeed, since discharge claims arise under Section 4(a)(1), and since petitioners' argument in effect concedes (Pet. Br. 13, 18-19 & n.10) that disparate impact claims are not cognizable under that subsection, there would not even appear to be a tenable disparate impact claim to evaluate. *See supra* p. 27.

Finally, and in all events, neither the OWBPA nor any other amendment to the ADEA has incorporated the disparate impact doctrine into the ADEA. Petitioners do not suggest that there is statutory language expressly doing so. Moreover, to do so implicitly, Congress would have at least had to "reenact" or "amend" the substantive prohibitions of the statute. *See Lorillard*, 434 U.S. at 580. Congress has *not* done so. And other statutory revisions—even related ones—are not legally sufficient. *See, e.g., Betts*, 492 U.S. at 168.

In short, contrary to the entire premise of petitioners' argument, because Congress may legislate only through bills passed by both Houses and presented to the President, legislative ratification may not be found in the failure of Congress to disapprove the EEOC's 1981 guidelines and the few judicial decisions that accepted such claims prior to *Hazen Paper*. *See, e.g., Cent. Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 186 (1994); *Landgraf*, 511 U.S. at 263.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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CASE SCHEDULED FOR ORAL ARGUMENT ON MAY 17, 1988

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 87-5361 & 87-5362

CLYDE J. ARNOLD, JR., *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

CHARLES R. NETHERTON, *et al.*,

Appellees,

v.

POSTMASTER GENERAL,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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* * *

ARGUMENT

I. The District Court Erred In Applying Disparate Impact Analysis In An ADEA Case

The District Court erred as a matter of law in ruling that the disparate impact theory developed in the Title VII context is applicable to the ADEA. 649 F. Supp. at 676. The Supreme Court has never approved such an extension of the effects test to age discrimination cases (*see Geller v. Markham*, 451 U.S. 945, 947-48 (1981) (Rehnquist, J., dissenting from the denial of certiorari)), and neither the language nor the purpose of the ADEA supports such an interpretation. Although several courts of appeals have applied disparate impact analysis in ADEA cases,[1] this Court has not done so and should not do so in this case.[2]

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[1] *See Holt v. The Greenwald Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Monroe v. United Air Lines, Inc.*, 736 F. 2d 394, 404 n.3 (7th Cir. 1984), *cert. denied*, 470 U.S. 1004 (1985); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690 (8th Cir. 1983); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394 (9th Cir. 1984); *Heward v. Western Electric Co.*, 35 FEP Cases 807, 810 (10th Cir. 1984); The Fifth Circuit has expressly left the question open. *Adkins v. South Central Bell Telephone Co.*, 744 F.2d 1133, 1136 (5th Cir. 1984); *Thornbrough v. Columbus and Greenville Railroad Co.*, 760 F.2d 633, 643 n.13 (5th Cir. 1985). Decisions in the Third and Eleventh Circuits discuss disparate impact analysis in the context of ADEA actions but have not applied it. *Blum v. Witco Chemical Corp.*, 829 F.2d 367, 372 (3rd Cir. 1987); *Allison v. Western Union*, 680 F.2d 1318, 1321-22 (11th Cir. 1982).

[2] Two ADEA decisions of this Court have made reference to disparate impact analysis. *Schmid v. Frosch*, 680 F.2d 248, 250-51 (D.C. Cir. 1982); *Krodel v. Young*, 748 F.2d 701, 709 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 817 (1985). However, both cases were analyzed and decided under disparate treatment analysis, and neither addressed the question of whether disparate impact analysis should be applied under the ADEA.

Section 4(f)(1) of the ADEA provides that it "shall not be unlawful for an employer . . . to take action otherwise prohibited . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).[3] A similar defense is found in the Equal Pay Act,[4] but not in Title VII. The Supreme Court has stated that the presence of this defense in the Equal Pay Act distinguishes that statute from Title VII and would preclude the application of the effects test in Equal Pay Act cases:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination . . . . Equal Pay Act litigation, therefore has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on bona fide use of "other factors other than sex."

Washington County v. Gunther, 452 U.S. 161, 170 (1981) (citations and footnotes omitted); *see also Los Angeles v.*

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[3] While section 4(f)(1) is not directly applicable to federal employees (*see* 29 U.S.C. § 633a(f)), this Court has nonetheless looked to it in delineating the burdens of proof in federal sector ADEA cases (*Schmid v. Frosch*, 680 F.2d 248, 250 n.7 (D.C. Cir. 1982); *Cuddy v. Carmen*, 694 F.2d 853, 858 n.23 (D.C. Cir. 1982)), and has held that the same substantive standards should be applied for establishing a violation of the ADEA in federal as in private sector cases (*Id.* at 856). Of course, it would have been very odd for Congress to have intended to curtail disparate impact analysis in private, but not federal, employment.

[4] The Equal Pay Act allows "a differential based on any other factor other than sex." 29 U.S.C. § 206(d)(1).

Manhart, 435 U.S. 702, 710-11 n.20, 713 n.24 (1978); *Geller, supra*, 451 U.S. at 949 (Rehnquist, J., dissenting).

As Judge Easterbrook argues in *Metz v. Transit Mix, Inc.*, 828 F.2d 1202 (7th Cir. 1987), the "reasonable factors other than age" defense in the ADEA "imp[ies] strongly that the employer may use a ground of decision that is not age, even if it varies with age . . . . 'The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact.'" *Id.* at 1220 (Easterbrook, J., dissenting) (citation omitted).[5]

Moreover, the policy considerations underlying the use of disparate impact analysis in Title VII cases are simply not present in age discrimination cases. In *Griggs v. Duke Power Company*, 401 U.S. at 424, 429-30 (1971), the seminal case for disparate impact analysis under Title VII, the Supreme Court held that Title VII was enacted "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." Accordingly, facially neutral practices that "operate to 'freeze' the status quo of prior discriminatory employment practices" were deemed to be prohibited unless job related. *Id.* at 430. In reaching this conclusion, the Court emphasized the inferior, segregated educational opportunities available to blacks, as well as prior discrimination in employment. *Id.*

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[5] *Accord* Blumrosen, *Interpreting the ADEA: Intent or Impact in the Age Discrimination in Employment Act* (1982); Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53 (Aut. 1986); Stacy, *A Case Against Extending the Adverse Impact Doctrine to the ADEA*, 10 Empl. Rel L.J. 437 (1985); Callile, *Three Developing Issues of the Federal Age Discrimination in Employment Act of 1967*, 54 Det. J. Urb. L. 431 (1977).

This need to avoid perpetuation of past discrimination has no applicability in the age discrimination context.[6] Unlike a facially neutral test which may have a disproportionate effect on minority applicants because of past discrimination in educational opportunities, a neutral practice which disadvantages older workers is not the product of prior discrimination against workers in the protected age group. *See* Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stan L. Rev. 837 (1982); Maltz, *The Expansion of the Role of the Effects Test in Antidiscrimination Law: A Critical Analysis*, 59 Neb. L. Rev. 345, 353-57 (1980). Rather, older workers are confronted with a different type of bias. As Senator Javits, one of the sponsors of the Act, noted:

> [T]here is simply a wide-spread, irrationality that once men and women are past a certain age they are no longer capable of performing even some of the most routine jobs.
>
> 113 Cong. Rec. 31253 (1967).

The ADEA was enacted to protect older workers against intentional bias as a result of stereotyping them as less able to perform because of their age. Of course, the aging phenomenon permits all to attain this unique and limited protection from intentional discrimination only when the age of 40 is reached — reflecting the mutability of the characteristic encompassed by the ADEA. (DX 55A-C; A 129). Thus, in this context, the ADEA was designed to protect workers by precluding discrimination *because* they aged, not,

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[6] Then Secretary of Labor Wirtz issued a report in 1965 in response to the direction of Congress in Section 715 of the Civil Rights Act of 1964 that he conduct a study with recommendations for "legislation to prevent arbitrary discrimination in employment because of age . . . ." The report recognized at the outset the differences between age and race discrimination. "The Older American Worker: Age Discrimination In Employment" (June 1965), in Legislative History of the Age Discrimination in Employment Act (Washington: U.S. Government Printing Office, 1981), p. 2.

as in the *Griggs* context, to break down barriers to advancement of the protected group even in the absence of intentional discrimination. Accordingly, it would be "inappropriate simply to transplant [Title VII] standards in their entirety into a different statutory scheme having a different history." *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring).

* * *

29 C.F.R. § 860 (1970):

* * *

§ 860.1 Purpose of this Part.

This part is intended to provide an interpretative bulletin on the Age Discrimination in Employment Act of 1967 like Subchapter B of this title relating to the Fair Labor Standards Act of 1938. Such interpretations of this Act are published to provide "a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" (Skidmore v. Swift & Co., 323 U.S. 134, 138). These interpretations indicate the construction of the law which the Department of Labor believes to be correct, and which will guide it in the performance of its administrative and enforcement duties under the Act unless and until it is otherwise directed by authoritative decisions of the Courts or concludes, upon reexamination of an interpretation, that it is incorrect.

[33 F.R. 9172, June 21, 1968]

* * *

§ 860.103 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age; * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the

particular facts and circumstances surrounding each individual situation.

(c) It should be kept in mind that it was not the purpose or intent of Congress in enacting this Act to require the employment of anyone, regardless of age, who is disqualified on grounds other than age from performing a particular job. The clear purpose is to insure that age within the limits prescribed by the Act, is not a determining factor in making any decision regarding hiring, dismissal, promotion or any other term, condition or privilege of employment of an individual.

(d) The reasonableness of a differentiation will be determined on an individual case by case basis, not on the basis of any general or class concept, with unusual working conditions given weight according to their individual merit.

(e) Further, in accord with a long chain of decisions of the Supreme Court of the United States with respect to other remedial labor legislation, all exceptions such as this must be construed narrowly, and the burden of proof in establishing the applicability of the exception will rest upon the employer, employment agent or labor union which seeks to invoke it.

(f) Where the particular facts and circumstances in individual situations warrant such a conclusion, the following factors are among those which may be recognized as supporting a differentiation based on reasonable factors other than age:

(1) (i) Physical fitness requirements based upon preemployment or periodic physical examinations relating to minimum standards for employment: *Provided, however,* That such standards are reasonably necessary for the specific work to be performed and are uniformly and equally applied to all applicants for the particular job category, regardless of age.

(ii) Thus, a differentiation based on a physical examination, but not one based on age, may be recognized as

reasonable in certain job situations which necessitate stringent physical requirements due to inherent occupational factors such as the safety of the individual employees or of other persons in their charge, or those occupations which by nature are particularly hazardous: For example, iron workers, bridge builders, sandhogs, underwater demolition men, and other similar job classifications which require rapid reflexes or a high degree of speed, coordination, dexterity, endurance, or strength.

(iii) However, a claim for a differentiation will not be permitted on the basis of an employer's assumption that every employee over a certain age in a particular type of job usually becomes physically unable to perform the duties of that job. There is medical evidence, for example, to support the contention that such is generally not the case. In many instances, an individual at age 60 may be physically capable of performing heavy-lifting on a job, whereas another individual of age 30 may be physically incapable of doing so.

(2) Evaluation factors such as quantity or quality of production, or education level, would be acceptable bases for differentiation when, in the individual case, such factors are shown to have a valid relationship to job requirements and where the criteria or personnel policy establishing such factors are applied uniformly to all employees, regardless of age.

(g) The foregoing are intended only as examples of differentiations based on reasonable factors other than age, and do not constitute a complete or exhaustive list or limitation. It should always be kept in mind that even in situations where experience has shown that most elderly persons do not have certain qualifications which are essential to those who hold certain jobs, some may have them even though they have attained the age of 60 or 64, and thus discrimination based on age is forbidden.

(h) It should also be made clear that a general assertion that the average cost of employing older workers as a group is

higher than the average cost of employing younger workers as a group will not be recognized as a differentiation under the terms and provisions of the Act, unless one of the other statutory exceptions applies. To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor along may be used to justify a differentiation — an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed.

[33 F.R. 9173, June 21, 1968]

§ 860.104 Differentiations based on reasonable factors other than age — Additional examples.

(a) *Employment of Social Security recipients.* (1) It is considered discriminatory for an employer to specify that he will hire only persons receiving old age Social Security insurance benefits. Such a specification could result in discrimination against other individuals within the age group covered by the Act willing to work under the wages and other conditions of employment involved, even though those wages and conditions may be peculiarly attractive to Social Security recipients. Similarly, the specification of Social Security recipients cannot be used as a convenient reference to persons of sufficient age to be eligible for old age benefits. Thus, where two persons apply for a job, one age 56, and the other age 62 and receiving Social Security benefits, the employer may not lawfully give preference in hiring to the older individual solely because he is receiving such benefits.

(2) Where a job applicant under age 65 is unwilling to accept the number or schedule of hours required by an employer as a condition for a particular job, because he is receiving Social Security benefits and is limited in the amount of wages he may earn without losing such benefits, failure to employ him would not violate the Act. An employer's

condition as to the number of schedule of hours may be "a reasonable factor other than age" on which to base a differentiation.

(b) *Employee testing.* The use of a validated employee test is not, of itself, a violation of the Act when such test is specifically related to the requirements of the job, is fair and reasonable, is administered in good faith and without discrimination on the basis of age, and is properly evaluated. A vital factor in employee testing as it relates to the 40-65-age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and, consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling. Therefore, situations in which an employee test is used as the sole tool or the controlling factor in the employee selection procedure will be carefully scrutinized to ensure that the test is for a permissible purpose and not for purposes prohibited by the statute.

(c) *Refusal to hire relatives of current employee.* There is no provision in the Act which would prohibit an employer, employment agency, or labor organization from refusing to hire individuals within the protected age group not because of their age but because they are relatives of persons already employed by the firm or organization involved. Such a differentiation would appear to be based on "reasonable factors other than age."

[34 F.R. 322, Jan. 9, 1969, as amended at 34 F.R. 9709, June 21, 1969]

* * *

44 Fed. Reg. 68,858 (Nov. 30, 1979):

29 C.F.R. Part 1625

Proposed Interpretations; Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission

ACTION: Proposed Interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978) responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, (ADEA) as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The Commission assumed enforcement of the ADEA on that date. The Commission proposes to adopt, except as modified herein, certain of the interpretations of the Department of Labor with respect to the enforcement of the Age Discrimination in Employment Act of 1967, as amended. The Department's interpretations currently appear at 29 CFR Part 860.

The age discrimination interpretations of the Department of Labor, issued in 1966 and amended several times thereafter, have been revised to reflect the statutory changes made in 1974 and 1978 as well as to reflect both the impact of judicial decisions and the past experience of the Department of Labor and the Commission. It is the Commission's position that these proposed interpretations be interpreted in a manner which is consistent with Title VII of the Civil Rights Act of 1964. The Commission has deleted many of the examples contained in the Department of Labor Interpretations. In some instances the deletions were made for stylistic purposes while in other instances examples were deleted because they were inconsistent with current law or because the Commission needed to accumulate expertise in certain areas.

* * *

1625.7 Differentiations based on reasonable factors other than age.

(a) Section 4(f)(1) of the Act provides that "It shall not be unlawful for an employer, employment agency, or labor organization * * * to take any action otherwise prohibited under paragraphs (a), (b), (c), or (e) of this section * * * where the differentiation is based on reasonable factors other than age * * * *"

(b) No precise and unequivocal determination can be made as to the scope of the phrase "differentiation based on reasonable factors other than age." Whether such differentiations exist must be decided on the basis of all the particular facts and circumstances surrounding each individual situation.

(c) A factor, upon which a differentiation is based, is not a valid defense, however, if age discrimination comprises any element of the employment decision adverse to the applicant or employee, either expressly or by implication.

(d) When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the ground that it is a "factor other than age," and such a practice has an adverse impact on persons in the protected age group and cannot be shown to be related to job performance, such a practice is unlawful. A vital factor in employee testing as it relates to the 40-70 age group protected by the statute is the "test-sophistication" or "test-wiseness" of the individual. Younger persons, due to the tremendous increase in the use of tests in primary and secondary schools in recent years, may generally have had more experience in test-taking than older individuals and consequently, where an employee test is used as the sole tool or the controlling factor in the employee selection procedure, such younger persons may have an advantage over older

applicants who may have had considerable on-the-job experience but who due to age, are further removed from their schooling.

(e) The burden of proof in establishing that the differentiation was based on factors other than age is upon the employer.

(f) A differentiation based on the average cost of employing older employees as a group is unlawful except with respect to employee benefit plans which qualify for the Section 4(f)(2) exception of the Act. (See also § 1625.10)

* * *

46 Fed. Reg. 47724 (Sept. 29, 1981):

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 C.F.R. Part 1625

Final Interpretations: Age Discrimination in Employment Act

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final Interpretations; Rescission of Interpretations.

EFFECTIVE DATE: Since the following final agency interpretations are interpretative rules or statements of policy, the 30-day delay in effective date as prescribed jurisdiction 553(d) of Title 5 U.S. Code does not apply. Accordingly, these interpretations are effective on September 29, 1981.

FOR FURTHER INFORMATION CONTACT: John Pagano, Office of the General Counsel, Legal Counsel Division, Equal Employment Opportunity Commission, 2401 E Street, NW, Room 2234, Washington, D.C. 20508, telephone 202-634-6595.

* * *

§1625.7 Differentiations based on reasonable factors other than age.

The Commission received numerous comments on this section and has decided to modify paragraphs (c), (d), and (e) of this section to clarify its position regarding the section 4(f)(1) exception of a reasonable factor other than age.

Paragraph (c) has been rewritten to illustrate that where an employment practice uses age as a limiting criterion, the defense that the practice is justified by the section 4(f)(1) exception of a reasonable factor other than age is unavailable. *See Marshall v. Goodyear Tire & Rubber Co.*, 19 EPD ¶8973 [W.D. Tenn. 1979]. Considerable confusion was generated on the proposed section from the apparent misunderstanding that, as originally written, it applied to the employer's burden of rebutting the *prima facie* case. That was incorrect. The section refers to the use of the Section 4(f)(1) defense of "a reasonable factor other then age," and has been clarified to indicate when that defense is unavailable. c.f. *City of Los Angeles, Department of Water and Power, et al. v. Manhart*, 435 U.S. 782, 712-13 (1978).

Paragraph (d) of § 1625.7 has been rewritten to make it clear that employment criteria that are age-neutral on their face but which nevertheless have a disparate impact on members of the protected age group must be justified as a business necessity. *See Laugesen v. Anaconda Corp.*, 510 F.2d 307 (8th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The final interpretation also contains a reference to the Commission's Guidelines on Employee Selection Procedures, 29 CFR Part 1807.

Paragraph (e) of 1625.7 has been modified to clarify its initial intent that when the defense of "a reasonable factor other than age" is raised against an individual claim of discriminatory treatment, the employer bears the burden of

showing that the "reasonable factor other than age" exists factually. *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979).

* * *

Signed at Washington, D.C., this 18th day of September 1981.

For the Commission,
J. Clay Smith, Jr.,
Acting Chair, Equal Opportunity Commission

* * *

UNITED STATES CODE ANNOTATED

TITLE 29. LABOR

CHAPTER 14--AGE DISCRIMINATION IN EMPLOYMENT

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 622. Education and research program; recommendation to Congress

(a) The Secretary of Labor shall undertake studies and provide information to labor unions, management, and the

general public concerning the needs and abilities of older workers, and their potentials for continued employment and contribution to the economy. In order to achieve the purposes of this chapter, the Secretary of Labor shall carry on a continuing program of education and information, under which he may, among other measures--

(1) undertake research, and promote research, with a view to reducing barriers to the employment of older persons, and the promotion of measures for utilizing their skills;

(2) publish and otherwise make available to employers, professional societies, the various media of communication, and other interested persons the findings of studies and other materials for the promotion of employment;

(3) foster through the public employment service system and through cooperative effort the development of facilities of public and private agencies for expanding the opportunities and potentials of older persons;

(4) sponsor and assist State and community informational and educational programs.

(b) Not later than six months after the effective date of this chapter, the Secretary shall recommend to the Congress any measures he may deem desirable to change the lower or upper age limits set forth in section 631 of this title.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization--

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization--

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably

necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to take any action otherwise prohibited under subsection (a), (b), (c), or (e) of this section--

(A) to observe the terms of a bona fide seniority system that is not intended to evade the purposes of this chapter, except that no such seniority system shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(B) to observe the terms of a bona fide employee benefit plan--

(i) where, for each benefit or benefit package, the actual amount of payment made or cost incurred on behalf of an older worker is no less than that made or incurred on behalf of a younger worker, as permissible under section 1625.10, title 29, Code of Federal Regulations (as in effect on June 22, 1989); or

(ii) that is a voluntary early retirement incentive plan consistent with the relevant purpose or purposes of this chapter.

Notwithstanding clause (i) or (ii) of subparagraph (B), no such employee benefit plan or voluntary early retirement incentive plan shall excuse the failure to hire any individual, and no such employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title,

because of the age of such individual. An employer, employment agency, or labor organization acting under subparagraph (A), or under clause (i) or (ii) of subparagraph (B), shall have the burden of proving that such actions are lawful in any civil enforcement proceeding brought under this chapter; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Repealed. Pub.L. 101-239, Title VI, § 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign employers not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the--

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control, of the employer and the corporation.

(i) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age; compliance; highly compensated employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits--

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan--

(A) if distribution of benefits under such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the

actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of Title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title or section 411(a)(3)(B) of Title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment in the benefit payable under the plan during such plan year attributable to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of Title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in

favor of highly compensated employees within the meaning of subchapter D of chapter 1 of Title 26.

(6) A plan shall not be treated as failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals or it is a plan permitted by subsection (m) of this section.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of Title 26 and subparagraphs (C) and (D) of section 411(b)(2) of Title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2).

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(8)(B) of Title 26.

(9) For purposes of this subsection--

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of Title 26.

(j) Employment as firefighter or law enforcement officer

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentality of a State or a political subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken--

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer, the employer has complied with section 3(d)(2) of the Age Discrimination in Employment Amendments of 1996 if the individual was discharged after the date described in such section, and the individual has attained--

(A) the age of hiring or retirement, respectively, in effect under applicable State or local law on March 3, 1983; or

(B)(i) if the individual was not hired, the age of hiring in effect on the date of such failure or refusal to hire under applicable State or local law enacted after September 30, 1996; or

(ii) if applicable State or local law was enacted after September 30, 1996, and the individual was discharged, the higher of--

(I) the age of retirement in effect on the date of such discharge under such law; and

(II) age 55; and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(k) Seniority system or employee benefit plan; compliance

A seniority system or employee benefit plan shall comply with this chapter regardless of the date of adoption of such system or plan.

(l) Lawful practices; minimum age as condition of eligibility for retirement benefits; deductions from severance pay; reduction of long-term disability benefits

Notwithstanding clause (i) or (ii) of subsection (f)(2)(B) of this section--

(1) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because--

(A) an employee pension benefit plan (as defined in section 1002(2) of this title) provides for the attainment of a minimum age as a condition of eligibility for normal or early retirement benefits; or

(B) a defined benefit plan (as defined in section 1002(35) of this title) provides for--

(i) payments that constitute the subsidized portion of an early retirement benefit; or

(ii) social security supplements for plan participants that commence before the age and terminate at the age (specified by the plan) when participants are eligible to receive reduced or unreduced old-age insurance benefits under title II of the Social Security Act (42 U.S.C. 401 et seq.), and that do not exceed such old-age insurance benefits.

(2)(A) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because following a contingent event unrelated to age--

(i) the value of any retiree health benefits received by an individual eligible for an immediate pension;

(ii) the value of any additional pension benefits that are made available solely as a result of the contingent event unrelated to age and following which

the individual is eligible for not less than an immediate and unreduced pension; or

(iii) the values described in both clauses (i) and (ii); are deducted from severance pay made available as a result of the contingent event unrelated to age.

(B) For an individual who receives immediate pension benefits that are actuarially reduced under subparagraph (A)(i), the amount of the deduction available pursuant to subparagraph (A)(i) shall be reduced by the same percentage as the reduction in the pension benefits.

(C) For purposes of this paragraph, severance pay shall include that portion of supplemental unemployment compensation benefits (as described in section 501(c)(17) of Title 26) that--

(i) constitutes additional benefits of up to 52 weeks;

(ii) has the primary purpose and effect of continuing benefits until an individual becomes eligible for an immediate and unreduced pension; and

(iii) is discontinued once the individual becomes eligible for an immediate and unreduced pension.

(D) For purposes of this paragraph and solely in order to make the deduction authorized under this paragraph, the term "retiree health benefits" means benefits provided pursuant to a group health plan covering retirees, for which (determined as of the contingent event unrelated to age)--

(i) the package of benefits provided by the employer for the retirees who are below age 65 is at least comparable to benefits provided under title XVIII of the Social Security Act (42 U.S.C. 1395 et seq.);

(ii) the package of benefits provided by the employer for the retirees who are age 65 and above is

at least comparable to that offered under a plan that provides a benefit package with one-fourth the value of benefits provided under title XVIII of such Act; or

(iii) the package of benefits provided by the employer is as described in clauses (i) and (ii).

(E)(i)If the obligation of the employer to provide retiree health benefits is of limited duration, the value for each individual shall be calculated at a rate of $3,000 per year for benefit years before age 65, and $750 per year for benefit years beginning at age 65 and above.

(ii) If the obligation of the employer to provide retiree health benefits is of unlimited duration, the value for each individual shall be calculated at a rate of $48,000 for individuals below age 65, and $24,000 for individuals age 65 and above.

(iii) The values described in clauses (i) and (ii) shall be calculated based on the age of the individual as of the date of the contingent event unrelated to age. The values are effective on October 16, 1990, and shall be adjusted on an annual basis, with respect to a contingent event that occurs subsequent to the first year after October 16, 1990, based on the medical component of the Consumer Price Index for all-urban consumers published by the Department of Labor.

(iv) If an individual is required to pay a premium for retiree health benefits, the value calculated pursuant to this subparagraph shall be reduced by whatever percentage of the overall premium the individual is required pay.

(F) If an employer that has implemented a deduction pursuant to subparagraph (A) fails to fulfill the obligation described in subparagraph (E), any aggrieved individual may bring an action for specific performance of the obligation described in subparagraph (E). The

relief shall be in addition to any other remedies provided under Federal or State law.

(3) It shall not be a violation of subsection (a), (b), (c), or (e) of this section solely because an employer provides a bona fide employee benefit plan or plans under which long-term disability benefits received by an individual are reduced by any pension benefits (other than those attributable to employee contributions)--

(A) paid to the individual that the individual voluntarily elects to receive; or

(B) for which an individual who has attained the later of age 62 or normal retirement age is eligible.

(m) Voluntary retirement incentive plans

Notwithstanding subsection (f)(2)(b), it shall not be a violation of subsection (a), (b), (c), or (e) solely because a plan of an institution of higher education (as defined in section 1001 of Title 20) offers employees who are serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure) supplemental benefits upon voluntary retirement that are reduced or eliminated on the basis of age, if--

(1) such institution does not implement with respect to such employees any age-based reduction or cessation of benefits that are not such supplemental benefits, except as permitted by other provisions of this chapter;

(2) such supplemental benefits are in addition to any retirement or severance benefits which have been offered generally to employees serving under a contract of unlimited tenure (or similar arrangement providing for unlimited tenure), independent of any early retirement or exit-incentive plan, within the preceding 365 days; and

(3) any employee who attains the minimum age and satisfies all non-age-based conditions for receiving a

benefit under the plan has an opportunity lasting not less than 180 days to elect to retire and to receive the maximum benefit that could then be elected by a younger but otherwise similarly situated employee, and the plan does not require retirement to occur sooner than 180 days after such election.

§ 624. Study by Secretary of Labor; reports to President and Congress; scope of study; implementation of study; transmittal date of reports

(a)(1) The Secretary of Labor is directed to undertake an appropriate study of institutional and other arrangements giving rise to involuntary retirement, and report his findings and any appropriate legislative recommendations to the President and to the Congress. Such study shall include--

(A) an examination of the effect of the amendment made by section 3(a) of the Age Discrimination in Employment Act Amendments of 1978 in raising the upper age limitation established by section 631(a) of this title to 70 years of age;

(B) a determination of the feasibility of eliminating such limitation;

(C) a determination of the feasibility of raising such limitation above 70 years of age; and

(D) an examination of the effect of the exemption contained in section 631(c) of this title, relating to certain executive employees, and the exemption contained in section 631(d) of this title, relating to tenured teaching personnel.

(2) The Secretary may undertake the study required by paragraph (1) of this subsection directly or by contract or other arrangement.

(b) The report required by subsection (a) of this section shall be transmitted to the President and to the Congress as an

interim report not later than January 1, 1981, and in final form not later than January 1, 1982.

§ 625. Administration

The Secretary shall have the power--

(a) Delegation of functions; appointment of personnel; technical assistance

to make delegations, to appoint such agents and employees, and to pay for technical assistance on a fee for service basis, as he deems necessary to assist him in the performance of his functions under this chapter;

(b) Cooperation with other agencies, employers, labor organizations, and employment agencies

to cooperate with regional, State, local, and other agencies, and to cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this chapter.

§ 626. Recordkeeping, investigation, and enforcement

(a) Attendance of witnesses; investigations, inspections, records, and homework regulations

The Equal Employment Opportunity Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures

provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a

violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) Filing of charge with Commission; timeliness; conciliation, conference, and persuasion

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed--

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice

Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program

offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to--

(i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver

may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

§ 629. Criminal penalties

Whoever shall forcibly resist, oppose, impede, intimidate or interfere with a duly authorized representative of the Equal Employment Opportunity Commission while it is engaged in the performance of duties under this chapter shall be punished by a fine of not more than $500 or by imprisonment for not more than one year, or by both: Provided, however, That no person shall be imprisoned under this section except when there has been a prior conviction hereunder.

§ 630. Definitions

For the purposes of this chapter--

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations,

business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: Provided, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its

members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization--

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], or the Railway Labor Act, as amended [45 U.S.C.A. § 151 et seq.]; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or

political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision. The term "employee" includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959 [29 U.S.C.A. § 401 et seq.].

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act [43 U.S.C.A. § 1331 et seq.].

(j) The term "firefighter" means an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

(k) The term "law enforcement officer" means an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of a State, including an employee engaged in this activity who is transferred to a supervisory or administrative position. For the purpose of this subsection, "detention" includes the duties of employees assigned to guard individuals incarcerated in any penal institution.

(l) The term "compensation, terms, conditions, or privileges of employment" encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan.

§ 631. Age limits

(a) Individuals at least 40 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.

(b) Employees or applicants for employment in Federal Government

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age and who, for the 2- year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of

such employee, which equals, in the aggregate, at least $44,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Equal Employment Opportunity Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.

§ 632. Annual report to Congress

The Equal Employment Opportunity Commission shall submit annually in January a report to the Congress covering its activities for the preceding year and including such information, data and recommendations for further legislation in connection with the matters covered by this chapter as it may find advisable. Such report shall contain an evaluation and appraisal by the Commission of the effect of the minimum and maximum ages established by this chapter, together with its recommendations to the Congress. In making such evaluation and appraisal, the Commission shall take into consideration any changes which may have occurred in the general age level of the population, the effect of the chapter upon workers not covered by its provisions, and such other factors as it may deem pertinent.

§ 633. Federal-State relationship

(a) Federal action superseding State action

Nothing in this chapter shall affect the jurisdiction of any agency of any State performing like functions with regard to discriminatory employment practices on account of age except

that upon commencement of action under this chapter such action shall supersede any State action.

(b) Limitation of Federal action upon commencement of State proceedings

In the case of an alleged unlawful practice occurring in a State which has a law prohibiting discrimination in employment because of age and establishing or authorizing a State authority to grant or seek relief from such discriminatory practice, no suit may be brought under section 626 of this title before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated: Provided, That such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State law. If any requirement for the commencement of such proceedings is imposed by a State authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate State authority.

§ 633a. Nondiscrimination on account of age in Federal Government employment

(a) Federal agencies affected

All personnel actions affecting employees or applicants for employment who are at least 40 years of age (except personnel actions with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of Title 5, in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units in the government of the District of Columbia having positions in the competitive service, and in those units

of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on age.

(b) Enforcement by Equal Employment Opportunity Commission and by Librarian of Congress in the Library of Congress; remedies; rules, regulations, orders, and instructions of Commission: compliance by Federal agencies; powers and duties of Commission; notification of final action on complaint of discrimination; exemptions: bona fide occupational qualification

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission is authorized to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without backpay, as will effectuate the policies of this section. The Equal Employment Opportunity Commission shall issue such rules, regulations, orders, and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall--

(1) be responsible for the review and evaluation of the operation of all agency programs designed to carry out the policy of this section, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each department, agency, or unit referred to in subsection (a) of this section;

(2) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to nondiscrimination in employment on account of age; and

(3) provide for the acceptance and processing of complaints of discrimination in Federal employment on account of age.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions of the Equal Employment Opportunity Commission which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. Reasonable exemptions to the provisions of this section may be established by the Commission but only when the Commission has established a maximum age requirement on the basis of a determination that age is a bona fide occupational qualification necessary to the performance of the duties of the position. With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons

named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

(e) Duty of Government agency or official

Nothing contained in this section shall relieve any Government agency or official of the responsibility to assure nondiscrimination on account of age in employment as required under any provision of Federal law.

(f) Applicability of statutory provisions to personnel action of Federal departments, etc.

Any personnel action of any department, agency, or other entity referred to in subsection (a) of this section shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section.

(g) Study and report to President and Congress by Equal Employment Opportunity Commission; scope

(1) The Equal Employment Opportunity Commission shall undertake a study relating to the effects of the amendments made to this section by the Age Discrimination in Employment Act Amendments of 1978, and the effects of section 631(b) of this title.

(2) The Equal Employment Opportunity Commission shall transmit a report to the President and to the Congress containing the findings of the Commission resulting from the study of the Commission under paragraph (1) of this subsection. Such report shall be transmitted no later than January 1, 1980.

§ 634. Authorization of appropriations

There are hereby authorized to be appropriated such sums as may be necessary to carry out this chapter.

(16)

Supreme Court, U.S.
FILED
MAR 14 2002

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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36 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY POINTS 1

1. The ADEA's Clear Terms, and This Court's Previous Construction of Those Terms, Control This Case 1

2. The "Reasonable Factors Other Than Age" Defense Reflects Potential Liability for Age-Neutral Actions That Are Not Based on Reasonable Factors 3

3. Prior to 1993, Not One Court Had Held that the Disparate Impact Theory Was Inapplicable to the ADEA 7

4. The Parade of Horribles Promised by Florida Power and its *Amici* Will Not Come to Pass 8

5. The Secretary's Finding that Age Animus is Usually Not Behind Age Discrimination Supports the Use of Disparate Impact 10

6. The ADEA's Differences with Title VII Are Not Controlling 12

7. It is Not Difficult to Conduct a Meaningful Statistical Analysis 13

8. The Adams Group Has Adequately Alleged Disparate Impact 14

CONCLUSION 15

APPENDIX 1a

TABLE OF AUTHORITIES

Page

CASES

Cooley v. Carmike Cinemas,
25 F.3d 1325 (CA6 1994) 11

County of Washington v. Gunther,
452 U.S. 161 (1981) 4

Dothard v. Rawlinson,
433 U.S. 321 (1977) 12

Griggs v. Duke Power,
401 U.S. 424 (1971) 1, 11, 12, 13

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993) 1, 2, 6, 10, 11

Lorillard v. Ponds,
434 U.S. 575 (1978) 1

Los Angeles v. Manhart,
435 U.S. 702 (1978) 4

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989) 5, 12

Swierkiewicz v. Sorema N.A.,
122 S. Ct. 992 (2002) 14

Walker v. Southern Holdings,
934 F. Supp. 197 (M.D. La. 1996) 5

Watson v. Fort Worth Bank and Trust,
487 U.S. 977 (1988) 6, 11

STATUTES AND REGULATIONS

29 U.S.C. § 621(b) 9

29 U.S.C. § 623(a) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. § 623(f)(1) ..... *passim*

42 U.S.C. § 1981a(a)(1) 12

42 U.S.C. § 2000e-2(e) 9

MISCELLANEOUS

Alfred W. Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity (University of Wisconsin Press, 1993) 7

A. Conan Doyle, *Silver Blaze*, THE COMPLETE SHERLOCK HOLMES (1938) 7

Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819 (1997) 4

REPLY POINTS

1. The ADEA's Clear Terms, and This Court's Previous Construction of Those Terms, Control This Case.

By its terms, the ADEA makes it "unlawful for an employer to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). In *Griggs v. Duke Power*, 401 U.S. 424 (1971), and through the cases that followed it, the Court has held that essentially identical language in Title VII permits plaintiffs to prove discrimination through the disparate impact method where the employer has applied a facially neutral selection process to its employees and that process has disproportionately affected blacks or women adversely. Given that the prohibitions of the ADEA were taken *in haec verba* from Title VII, *Lorillard v. Ponds*, 434 U.S. 575, 584 (1978), this would normally be the end of any debate: the ADEA would be read *in pari materia* with Title VII, and the disparate impact method of proving discrimination would apply to the ADEA.

Until three Justices of the Court questioned this understanding in a concurring opinion in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), there was unanimous agreement in the lower courts that disparate impact analysis applied to the ADEA. Pet. Br. 6, 37. The Department of Labor and the EEOC had also construed the ADEA to

apply to age-neutral actions by employers.[1] Against the backdrop of these interpretations of the ADEA, Congress passed the OWBPA in 1990 to protect worker rights to bring ADEA claims, by ensuring that employees terminated in corporate downsizings were provided statistics to evaluate whether there had been a disproportionate impact upon older workers. *See* Academy Fla. Trial Lawyers Br. 3-12.

Since *Hazen Paper*, however, there have been arguments regarding whether the disparate impact method of proof should apply in age discrimination cases as it does in sex and race discrimination cases. These arguments (and some new ones) are presented in the briefs of Florida Power and its aligned *amici curiae*. Each of the arguments fails, however.

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[1] Florida Power correctly observes that the United States, on behalf of a defendant federal employer (per a U.S. Attorney's office, with an Assistant Attorney General co-signing), once filed a brief in a court of appeals arguing against the disparate impact method of proof. Resp. Brief at 46-47. But Florida Power incorrectly claims that "consistent with the longstanding position of the DOJ, the Solicitor General has chosen not to defend the EEOC's interpretations" of the ADEA (*id.* at 45). A copy of the Solicitor General's petition for a writ of certiorari in *EEOC v. Francis W. Parker School*, No. 94-1558, arguing forcefully in favor of the EEOC's interpretation, is attached as an appendix to this reply brief.

2. The "Reasonable Factors Other Than Age" Defense Reflects Potential Liability for Age-Neutral Actions That Are Not Based on Reasonable Factors.

Section 4(f)(1) of the ADEA provides a defense to employers who have engaged in actions that are "otherwise prohibited" by the Act, if the employer has based its "differentiation" between older and younger workers on "*reasonable* factors other than age." (Emphasis added). In the opening brief, the Adams Group argued that the reasonable factors defense reflected the potential liability of employers whose facially neutral policies discriminate in violation of Section 4(a). Pet. Br. 27-32; *see also* Nat'l Empl. Lawyers Ass'n Br. 8-22. Florida Power contends that the defense, which does not exist under Title VII, *precludes* potential liability for age neutral actions. Resp. Br. 10-14.

First, Florida Power presents an implausible interpretation of the reasonable factors language that renders the provision—by the company's own concession—"technically unnecessary," but purportedly relevant to "remove argued ambiguities, reassure skeptics, and/or constrain future interpretation by administrative agencies and courts." Resp. Br. 13. But then Florida Power cites no legislative authority or case law that even suggests the addition of the provision was technically unnecessary. *Cf.* Pet. Br. 27-32; Nat'l Empl. Lawyers Ass'n Br. 8-22.

Second, the company contends that Title VII's incorporation of the Equal Pay Act's (EPA's) "*any* other factor other than sex" affirmative defense means that there is no liability under Title VII for gender neutral pay practices

having a disparate impact on a gender, so the ADEA's "*reasonable* factors other than age" defense should also preclude disparate impact liability under that Act. Resp. Br. 28. The argument arises from *County of Washington v. Gunther*, 452 U.S. 161 (1981), a case in which the Court held that the EPA's "*any* other factor" defense applied to gender neutral claims under Title VII. *Gunther* did not hold that disparate impact was unavailable, but did indicate that an employer's defense to such a claim would be simply to show that its actions were based on sex neutral and bona fide factors.[2] *Id.* at 170-71.

Third, Florida Power maintains that there is no reason to believe Congress was aware of the EPA's similar language when it enacted the ADEA and thus there is no reason to conclude that Congress intended the word "reasonable" to have any meaning beyond the less-adorned defense incorporated into Title VII from the EPA. Resp. Br. 40-41. The "*any* other factor other than" defense was incorporated into Title VII by the Bennett Amendment shortly before the ADEA was passed, *Gunther*, 452 U.S. 171-72, and the defense and the "*reasonable* factors other than age" defense share a common genealogy: Secretary Wirtz administered and enforced the EPA when the ADEA was drafted. Mack A. Player, Note, *Wards Cove Packing or Not Wards Cove Packing? That is Not The Question: Some Thoughts on Impact Analysis Under The Age*

[2] Florida Power likewise relies on *Los Angeles v. Manhart*, 435 U.S. 702, 710 n.20 (1978), to suggest that the EPA's "any other factor" defense precludes all disparate impact claims under that Act. (Resp. Br. 28). The suggestion overlooks that in *Manhart* the Court held that if pay practice *was indeed* based on a factor other than sex the employer would not be subject to disparate impact liability. 435 U.S. at 710 n.20.

Discrimination in Employment Act, 31 U. RICH. L. REV. 819, 833-34 (1997).[3] Congress apparently did mean something more when it added the word "reasonable."[4]

Fourth, Florida Power argues that the ADEA's "reasonable factors other than age" defense is meant to apply to mixed-motive disparate treatment cases, so conduct intentionally taken "because of age" that would indeed be "otherwise prohibited" because it discriminated against individual employees is acceptable—as long as the differentiation between older and younger workers is based on factors *in addition to* age, and those factors are reasonable. Resp. Br. 11, 36, 38. *But see* Pet. Br. 24. Mixed motive cases, however, assume that there is an issue of whether the employer's improper motivation actually caused it to act in violation of the law. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 242 (1989) ("an employer shall not be liable if it can prove that, even if it

[3] It is curious that Florida Power is willing to put so many of its eggs in Secretary Wirtz's basket, but then overlooks the Secretary's role in this instance, and sees only a mysterious coincidence between the similar-but-materially-different EPA/Title VII defense and ADEA defense.

[4] Florida Power nonetheless also urges that requiring an employer to show that its actions were based on reasonable factors is no more than requiring that an explanation not be pretextual. Resp. Br. 10. In disparate treatment cases, however, "the jurisprudence has repeatedly noted the ADEA does not restrict an employer's authority to discharge an employee for no reason, for a good reason or even for a wrong reason." *See, e.g., Walker v. Southern Holdings*, 934 F. Supp. 197, 199 (M.D. La. 1996) (citing *Nix v. WLCY Radio/Rahall Communications*, 738 F.2d 1181 (CA11 1984)). Requiring an employer to justify the reasonableness of its actions can only make sense if those actions are "otherwise prohibited."

had not taken gender into account, it would have come to the same decision regarding a particular person"). The ADEA's reasonable factors defense, in contrast, expressly assumes that the employer's "action" would indeed be "prohibited," but then excuses the action if it was "based on" reasonable factors other than age.

Finally, Florida Power asserts that intent cannot be a consideration in disparate impact cases, so the reasonable factors defense for pure motivations—despite otherwise prohibited actions—means there can be no liability for disparate impact. Resp. Br. 36. The assertion overlooks the Court's analyses in *Watson* and *Hazen Paper*. In *Watson*, the Court explained the need for disparate impact analysis: "Furthermore, even if one assumed that any such [intentional] discrimination [in the use of subjective factors] can be adequately policed through disparate treatment analysis, the problem of subconscious stereotypes and prejudices would remain * * * ." *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 990 (1988). In *Hazen Paper*, the Court explained that the purpose of the ADEA was largely to address employment actions taken "on the basis of inaccurate and stigmatizing stereotypes" about older workers, but also stated that "[w]hen the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears." *Hazen Paper*, 507 U.S. at 610. Thus, while it is true that disparate impact does not require the plaintiff to prove the defendant's discriminatory motive, *id.* at 609 (citation omitted), disparate impact under the ADEA does permit the defendant to prevail by proving that its decision was indeed "*wholly* motivated by factors other than age." *Id. at 610* (emphasis added). The

reasonable factors other than age defense permits precisely this.

3. Prior to 1993, Not One Court Had Held that the Disparate Impact Theory Was Inapplicable to the ADEA.

Florida Power argues that Congress could not assume that the disparate impact doctrine was applicable when it enacted the OWBPA (Resp. Br. 48-50) despite the fact that numerous courts of appeals had so held and this Court had denied certiorari on the issue. According to Florida Power, this is so because one Justice of this Court (now the Chief Justice) issued a dissent from a denial of certiorari in 1981. That assertion strains credulity. Further, the idea that Congress would consider persuasive a brief filed by the United States, in its capacity as an employer, to dismiss workplace bias claims, in the face of contrary law in six circuits is preposterous. The notion is also contrary to the position of the agency charged with administering the ADEA in deciding whether it was necessary to codify such precedent. The watchdog did not bark because there was no stranger in the yard, only an unbroken decade-long acceptance by the judicial and administrative branches, that the disparate impact doctrine was the law.[5]

In the event that this Court concludes that the statutory language of section 4(a)(1) and 4(a)(2) is ambiguous, "traditional methods of statutory interpretation" are justified to resolve the ambiguities. *See* Alfred W.

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[5] A. Conan Doyle, *Silver Blaze*, THE COMPLETE SHERLOCK HOLMES 383 (1938).

Blumrosen, Modern Law: The Law Transmission System and Equal Employment Opportunity, pp. 100-123 (University of Wisconsin Press, 1993). These methods include examining the Floor Manager's undisputed statement at the time of submission of the OWBPA bill to the Senate, after a year of Congressional activity, that workers with counsel should be able to make a judgment about whether they had evidence to support litigation under the ADEA or take a settlement offer. Contrary to Florida Power's view (Resp. Br. 50), the only statistics that employees would need are the ones Congress required. Congress did not require that employers supply all reasons for large scale discharge, but only those that would inform the judgment as to whether the ADEA was implicated.

The OWBPA argument is *not* about ratification by silence, as Florida Power would characterize it. Rather, the argument is about the understanding that Congress had at the time as to what the law was, in order to make sense of the limitations on waivers in the OWBPA with respect to "a group or class of employees." Florida Power's brief has carefully avoided this issue.

4. The Parade of Horribles Promised by Florida Power and its *Amici* Will Not Come to Pass.

Florida Power and its *amici* predictably promise a parade of horribles if workers are permitted to use the disparate impact method of proving employment discrimination in ADEA cases. Resp. Br. 19-26; Pac. Legal Found. Br. 17-24; Chamber Br. 3-4. They similarly contend that disparate impact analysis is inappropriate for the

ADEA because, unlike with race and gender discrimination, age discrimination is often based on *correct* stereotypes about older workers. *See, e.g.*, Chamber Br. at 8 ("adverse assumptions about older employees' abilities * * * sometimes will prove true."). To the extent age *is* sometimes a logical explanation for why an employer would not want older workers, disparate impact will hardly force employers to employ older workers against their wishes because Congress has already created defenses—including the reasonable factors defense—that permit employers to act adversely toward older workers.[6] To deny application of the disparate impact theory because stereotypes are *sometimes* accurate, as Florida Power and its *amici* suggest, however, would endorse the idea that age should be a *general* proxy for competence, untethered to the ADEA's statutory scheme. This is an idea in direct conflict with the Act's purpose of promoting employment of older persons based on their ability rather than age. 29 U.S.C. § 621(b).

In any event, the parade of horribles argument is flawed because it overlooks the years that the disparate impact method was presumed to apply to the ADEA. *See, e.g.*, App. 16a (Solicitor General's petition noting number of EEOC actions based on disparate impact prior to 1995).

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[6] Both Title VII and the ADEA recognize that not all discrimination is arbitrary and unlawful by providing statutory defenses. For example, some facially discriminatory policies will not be deemed "arbitrary" if the employer can demonstrate that the classification is a bona fide occupational qualification reasonably necessary to the particular business. *See* Title VII § 703(e), 42 U.S.C. § 2000e-2(e) and ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1).

Florida Power has not shown how during those years there was a deluge of additional ADEA cases, nor that gathering evidence demonstrating business necessity was unduly difficult for non-discriminating employers, nor that quotas were common responses, nor that preferential treatment of older workers was ever afforded. And the availability of disparate impact liability hardly means that such an approach will be successful. As Florida Power correctly observed in opposition to the Adams Group's petition for a writ of certiorari, "only the Ninth Circuit has actually upheld a disparate impact claim on appeal since *Hazen Paper.*" Brief in Opp. at 11.

Florida Power and its *amici* seek to recast the disparate impact method of proof as something revolutionary that would be added to older workers' arsenal and alter ADEA litigation to the ruination of employers. But before *Hazen Paper* older workers had disparate impact available to them throughout the country and there were relatively few disparate impact cases brought under the theory. Due to the statutory defenses available to employers, even fewer of those cases were successful.

5. The Secretary's Finding that Age Animus is Usually Not Behind Age Discrimination Supports the Use of Disparate Impact.

Many racial discrimination claims, and some sex discrimination claims, are based on the animus of an employer. Clearly, however, there are numerous racial and sex discrimination claims based on stereotypes rather than animus. Florida Power argues that there should be no ADEA liability for practices that are fair in form but discriminatory in operation against older workers

because animus is not behind age discrimination. *But see Cooley v. Carmike Cinemas*, 25 F.3d 1325, 1329 (CA6 1994) (age animus). The Chamber of Commerce also asserts that "[t]he ADEA's express focus on arbitrary discrimination demonstrates that [the ADEA] was intended to be narrower in scope than Title VII." Chamber Br. 9 (citations omitted).

The logic fails for several reasons: First, there has never been *any* distinction between Title VII disparate impact cases based on stereotypes and those based on discriminatory animus. Second, subtler sources of age bias make disparate impact even *more* important to detect "arbitrary" and unconscious age stereotypes. Third, the argument does not adequately account for the Court's statement in *Griggs* that disparate impact is a method for removing "artificial, *arbitrary*, and unnecessary barriers." 401 U.S. at 431 (emphasis added). Fourth, the Secretary's 1965 Report addresses the same kinds of disparate impacts that *Griggs* discusses—disproportionately lower test scores, lower educational attainment, (and also lesser physical vigor)—to conclude that stereotypes produce irrational age-based discrimination in the form of neutral job criteria that are unrelated to business necessity. J.A. 359-60, 371-73. Fifth, the assertion assumes that disparate impact was never clarified beyond *Griggs* before the Civil Rights Act of 1991. By the time of *Watson*, it was clear that disparate impact existed for the purpose of detecting stereotypes, and this Court later observed in *Hazen Paper* that the ADEA was largely passed to address the consequences of inaccurate stereotypes about older workers. *Watson*, 487 U.S. at 989-90; *Hazen Paper*, 507 U.S. at 610.

Sixth, the 11th hour and unusual political history of Congress' inclusion of sex in Title VII does not suggest that Congress considered historical animus against women in passing the Act, *see Price Waterhouse v. Hopkins*, 490 U.S. at 244 n.9, yet it is undisputed that disparate impact may be used to challenge gender discrimination. *Dothard v. Rawlinson*, 433 U.S. 321 (1977).

6. The ADEA's Differences with Title VII Are Not Controlling.

Florida Power asserts that disparate impact liability is not available under the ADEA because the ADEA's *procedural* provisions come from the Fair Labor Standards Act and permit jury trials, while Title VII does not permit disparate impact jury trials. Whether construction of Title VII or the FLSA is more appropriate to understanding a given provision in the ADEA should hinge on the origin of that provision. While it is true that the procedures of the ADEA come largely from the FLSA, the prohibitions —*i.e.*, the actual provisions that determine whether the neutral practices falling disproportionately on protected groups without a reasonable basis are prohibited—came directly from Title VII.

When it amended Title VII in 1991 to provide expressly for disparate impact liability and define the ambit of that liability, Congress did choose to include in the new provision a prohibition on jury trials. 42 U.S.C. § 1981a(a)(1) & (c). Such an alteration does not alter the holding in *Griggs* that Title VII's prohibitions (shared by the ADEA): "proscribe[ ] not only overt discrimination but also practices that are fair in form, but discriminatory

in operation." *Griggs v. Duke Power Co.*, 401 U.S. at 431. Not a word in *Griggs* remotely suggested that the Court's ruling was influenced by the fact that jury trials were not available.

7. It is Not Difficult to Conduct a Meaningful Statistical Analysis.

According to Florida Power and the Equal Employment Advisory Council, the disparate impact method of proof cannot function under the ADEA because age is fluid and statistical analysis is simply too difficult for juries since the ADEA "prohibits discrimination on the basis of age and not class membership." Resp. Br. 22-23 (quoting *O'Connor v. Consolidated Coin Carriers*, 517 U.S. 308, 313 (1996)); E.E.A.C. Br. 17-19. There are two flaws with this outdated argument. First, any data captures a moment in time of a particular employer and would fix the age comparison for that time, *i.e.*, the data before and after a reduction-in-force. The fluid workplace argument fails to reflect the changing work patterns and movement of all workers. Many older individuals change jobs and have only a few years of service with one employer at older ages. Long gone are the days when age and years of service or experience in one field had strong correlations. It is now more common for all workers to change jobs frequently.

Second, there are numerous ways by which such a snapshot of an employer's workforce composition could easily be verified. For example, a statistical analysis of the median age of the workers terminated and the median age of the workers retained in a downsizing—coupled with statistical evidence of disparate impact on workers over the age of 40—might provide a

worthwhile means of detecting age discrimination. Under such a model, the smaller the disparity in median ages, the greater the disparity in impact would have to be. In all cases, however, the disparity would have to be at least as substantial as it is in other discrimination cases.

8. The Adams Group Has Adequately Alleged Disparate Impact.

The district court's ruling was made as a pure matter of law, so the allegations in the complaint upon which the court necessarily relied are controlling in this interlocutory proceeding. The Adams Group has alleged that Florida Power's "reduction in force" had a "disproportionate impact on older employees." (J.A. 26-27). Florida Power argues, however, that the Adams Group failed to identify with adequate specificity the action Florida Power undertook that had a disparate impact on older workers. Florida Power's brief was filed the day before *Swierkiewicz v. Sorema N.A.*, 122 S. Ct. 992 (2002), was decided; there is no heightened pleading standard for ADEA cases.[7]

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[7] Florida Power appears flummoxed because the Adams Group *also* refers to the gross statistics available to them at the point in the case when the district court ruled, *i.e.*, over 70% of the workers terminated were over 40. Resp. Br. 33 (citing Pet. Br. 15, 34). While that number does not have independent significance, the statistician retained by the Adams Group to conduct a preliminary review of the evidence available at the time of the district court's ruling did, in fact, indicate that a reduction in force originating from senior management and carried out by those at lower levels had had a disparate impact upon Florida Power's older workers after senior management set parameters for the reduction in force. J.A. 283-84; *see also id.* at 298-304 (memorandum in opposition to decertification describing facts known at time of district court's ruling).

CONCLUSION

The judgment of the court of appeals should be reversed. The case should be remanded to the district court for further proceedings to allow the petitioners to proceed with their disparate impact claims under the ADEA.

Respectfully submitted,

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March 2002

No. 94-1558

In the Supreme Court of the United States

OCTOBER TERM, 1994

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
PETITIONER

v.

FRANCIS W. PARKER SCHOOL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, prohibits disparate impact discrimination.

2. If so, whether the ADEA prohibition against disparate impact discrimination protects applicants for employment.

* * *

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Equal Employment Opportunity Commission, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 41 F.3d 1073. The opinion and orders of the district court (App., *infra*, 17a-18a, 19a-41a, 42a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1994. A petition for rehearing was denied on November 18, 1994. App., *infra*, 44a-45a. By order dated February 9, 1995, Justice Stevens extended the time

within which to file a petition for a writ of certiorari to and including March 18, 1995 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, are reproduced in the Appendix, *infra*, 46a-48a.

STATEMENT

1. Francis W. Parker School (respondent) is a private K-12 school in Chicago, Illinois. App., *infra*, 19a. Respondent's collective bargaining agreement establishes a 22-step pay system for incumbent teachers. *Ibid.* Under that system, each year of additional experience as a teacher for respondent produces a corresponding increase in salary. *Ibid.* In 1989, for example, step one on the salary chart corresponded to a salary of $22,000, while step 22 on the salary chart corresponded to a salary of approximately $46,000. *Id.* at 19a-20a. Under the collective bargaining agreement, the principal has the discretion to determine the entry salary of all new teachers. *Id.* at 27a. After teachers have been hired, they then progress one step in salary each year. *Ibid.*

As a matter of practice, respondent determines the entry salary for new teachers based on their years of prior relevant experience. App., *infra*, 2a. For example, if the principal determines that a teacher has five years of relevant experience, the teacher would receive an entry

salary that corresponds to step five on respondent's salary chart. Consistent with that policy, when respondent sets a salary cap for a teaching vacancy, it refuses to consider applicants whose experience level would require them to be paid above the cap. *Id.* 20a-21a & n.1, 22a-23a, 25a. That practice of refusing to consider experienced applicants for certain positions is the policy at issue in this case.

In the fall of 1988, one of respondent's drama teachers left the school and respondent began searching for a replacement. App., *infra,* 20a. For budgetary reasons, respondent decided that it could offer no more than $28,000 for that position. *Id.* at 20a-21a. Under respondent's salary system, teachers with more than six years of experience earn more than $28,000. *Id.* at 21a n.1. Respondent therefore limited its search for a new drama teacher to persons who had six years of relevant experience or less. *Id.* at 20a-21a & n.1.

Harold Johnson, who was 63 years old and had 30 years of teaching experience, applied for the vacancy. App., *infra,* 21a-22a & n.3. Respondent rejected Johnson's application. *Id.* at 22a-23a. Respondent told Johnson that he could not be hired because his experience level required that he receive a higher salary than respondent could afford to pay. *Ibid.* Respondent then hired a person in her 20s, who had approximately one year of relevant experience. *Id.* at 21a.

Petitioner Equal Employment Opportunity Commission (EEOC) filed suit against respondent alleging that its conduct violated the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.* App., *infra,* 23a.

The EEOC did not challenge respondent's right to set a salary cap for teaching vacancies. *Id.* at 32a. Rather, the EEOC challenged respondent's practice of precluding applicants, whose experience level would qualify them for a higher salary, from competing for vacancies at the salary dictated by the cap. *Ibid.* Relying on a disparate impact theory of discrimination, the EEOC asserted that this practice violated the ADEA because it arbitrarily screened out persons 40 years of age and older at a much higher rate than persons under 40. *Id.* at 32a, 38a-39a.*

2. The district court initially refused to grant respondent's motion for summary judgment. App. *infra,* 19a-41a. The district court found that respondent's practice of precluding experienced teachers from competing for positions with salary caps when their experience level required a higher salary under respondent's salary system had a disproportionate impact on persons 40 years of age and older. *Id.* at 39a-41a. In addition, the court noted that respondent's summary judgment motion did not contain any evidence that it had a business justification for this practice. *Id.* at 38a. Accordingly, the court concluded that respondent was not entitled to summary judgment. *Id.* at 41a.

After this court decided *Hazen Paper Co. v. Biggins,* 113 S. Ct. 1701 (1993), respondent sought reconsideration

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* The EEOC also alleged that respondent's conduct violated the ADEA under a disparate treatment theory of liability. App., *infra,* 24a. The district court granted summary judgment against the EEOC on that theory, and the EEOC did not appeal from that determination. *Id.* at 42a-43a. That theory of liability is therefore not at issue here.

of its motion for summary judgment. The district court denied the motion, reasoning in part that "*Hazen* does not change the law concerning disparate impact analysis." App., *infra*, 43a.

Respondent then filed a new motion for summary judgment, and this time the district court granted it. App., *infra*, 17a-18a. The court reasoned that under *Hazen Paper*, evidence that a practice excludes a disproportionate percentage of workers 40 years of age and older "is not enough, standing alone, to support ADEA liability." *Id.* at 18a.

3. A divided panel of the court of appeals affirmed. App., *infra*, 1a-16a. The majority concluded that *Hazen Paper* precludes the use of disparate impact theory under the ADEA. *Id.* at 5a-6a. Although the court of appeals acknowledged that *Hazen Paper* was a disparate treatment case, it concluded that the Court's analysis in that case was "instructive." *Id.* at 5a. Relying on the statement in *Hazen Paper* that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA" (113 S. Ct. at 1706), the court of appeals held that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra*, 5a-6a.

The court concluded that this interpretation was supported by the ADEA's exception for differentiations based on "reasonable factors other than age." App., *infra*, 6a-7a. That exception, the court determined, "suggests that decisions which are made for reasons independent of

age but which happen to correlate with age are not actionable under the ADEA." *Ibid.*

The court rejected the argument that because the language in the ADEA mirrors the language in Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and Title VII has been interpreted by this Court to prohibit disparate impact discrimination, the ADEA must prohibit disparate impact discrimination as well. App., *infra*, 7a-8a. The court reasoned that the statutory provision in Title VII that has been interpreted to prohibit disparate impact discrimination applies to applicants for employment, while the corresponding provision in the ADEA does not. *Ibid.*

The court of appeals then held that the EEOC was required to prove that respondent's practice of precluding teachers from competing for positions with salary caps when their experience level required a higher salary under respondent's salary system was "predicated on some stereotype, conscious or unconscious." App., *infra*, 9a. Because the EEOC did not allege that this practice was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court of appeals held that the district court had properly granted summary judgment in favor of respondent. *Ibid.*

Judge Cudahy dissented from the panel's decision. App., *infra*, 10a-16a. He agreed with the majority that *Hazen Paper* limits ADEA liability to decisions based on "misperceptions about the competence of older workers." *Id.* at 10a. He concluded, however, that disparate impact analysis is an appropriate method for determining

whether an employment practice is based on age-related stereotypes. *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals has held that the ADEA does not prohibit disparate impact discrimination. That holding conflicts with the holdings of three other circuits; it is inconsistent with this court's interpretation of Title VII, upon which the ADEA was modelled; and it significantly narrows the scope of the protection afforded by the ADEA. The court of appeals also erred in holding that the ADEA does not prohibit disparate impact discrimination against applicants for employment. Review by this Court is therefore warranted.

1. This court has recognized a distinction between disparate treatment and disparate impact theories of employment discrimination. Disparate treatment occurs when an employer treats some people less favorably than others because of a protected characteristic. When disparate treatment is alleged, proof of discriminatory motive is required. *Hazen Paper,* 113 S. Ct. at 1705. In contrast, disparate impact discrimination occurs when an employment practice that is facially neutral affects one group more harshly than another and is not shown to be job-related. When disparate impact discrimination is alleged, proof of discriminatory motive is not required. *Ibid.*

Respondent's practice of refusing to permit experienced teachers to compete for positions with salary caps when their experience level would require them to be paid at a higher salary under respondent's salary system is an example of disparate impact discrimination. That

practice, while facially neutral, has the effect of screening out persons 40 years of age and older at a much higher rate than persons under 40 years of age. App., *infra,* 38a-39a. The only justification respondent offers for that practice is its desire to limit the salary of the teachers that it hires to an amount within its budget. That interest can be fully served by setting a salary cap and then permitting persons of all experience levels to compete for the position at the salary dictated by the cap. Respondent's practice of refusing to consider applicants who are willing to work for the amount dictated by the cap simply because their experience level would require a higher salary under respondent's salary system therefore constitutes the very kind of arbitrary barrier to employment opportunity that the disparate impact theory of discrimination condemns. See *Griggs v. Duke Power Co.,* 401 U.S. 424, 431 (1971).

The court of appeals did not hold otherwise. Rather, it held that the ADEA simply does not prohibit disparate impact discrimination. The court specifically stated that the ADEA is violated only when the challenged practice is "based on misperceptions about the competence of older workers" and that "decisions based on criteria which merely tend to affect workers over the age of forty more adversely than workers under forty are not prohibited." App., *infra,* 6a. Because the EEOC had not alleged that the practice challenged in this case was "a subterfuge for the belief that older teachers are less effective than younger teachers," the court affirmed the district court's award of summary judgment against the EEOC. *Id.* at 9a.

2. The Seventh Circuit's decision in this case conflicts with decisions from the Second, Eighth, and Ninth

Circuits. Those circuits have all squarely held that the ADEA prohibits disparate impact discrimination. *Geller v. Markham*, 635 F.2d 1027, 1032-1034 (2d Cir. 1980) (practice of limiting applicants to persons with less than five years of experience violates the ADEA), cert. denied, 451 U.S. 945 (1981); *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 690-692 (8th Cir. 1983) (practice of reserving positions for non-tenured faculty violates the ADEA); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1394-1395 (9th Cir. 1984) (denial of severance pay to those eligible to retire violates the ADEA). While rejecting disparate impact claims based on the facts before them, the remaining circuits that have addressed the question have all assumed that the ADEA prohibits disparate impact discrimination. *Holt v. Gamewell Corp.*, 797 F.2d 36, 37 (1st Cir. 1986); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), cert. denied, 464 U.S. 937 (1983); *Wooden v. Board of Educ.*, 931 F.2d 376, 379 (6th Cir. 1991); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1428 (10th Cir. 1993); *MacPherson v. University of Montevallo*, 922 F.2d 766, 770-771 (11th Cir. 1991); *Arnold v. United States Postal Serv.*, 863 F.2d 994, 998 (D.C. Cir. 1988), cert. denied, 493 U.S. 846 (1989). The Seventh Circuit is the only circuit to have held that the ADEA does not prohibit disparate impact discrimination.

The conflict in the circuits on this issue is unlikely to abate. The Seventh Circuit denied the EEOC's suggestion for rehearing en banc in this case. App., *infra*, 44a-45a. And while the Seventh Circuit has read *Hazen Paper* to preclude disparate impact analysis under the ADEA, the Eighth and Ninth Circuits have both continued to apply disparate impact analysis in post-*Hazen Paper* cases. *Haughton v. Sipco, Inc.*, 38 F.3d 953, 958-959 (8th Cir. 1994);

EEOC v. Local 350, Plumbers & Pipefitters, 998 F.2d 641, 646, 648 n.2 (9th Cir. 1992). This Court should grant certiorari to resolve the conflict in the circuits created by the Seventh Circuit's decision in this case.

3. a. The availability of disparate impact analysis under the ADEA follows from a line of cases beginning with this Court's decision in *Griggs*. At issue in *Griggs* was the proper construction of Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2) (1970). As originally enacted in 1964 (as well as at the time of the Court's decision in *Griggs* in 1971), Section 703(a)(2) made it unlawful for an employer "to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." See 401 U.S. at 426 n.1. In *Griggs*, the Court interpreted Section 703(a)(2) to prohibit practices that have a disparate impact on groups protected by Title VII and that are not shown to be job-related. 401 U.S. at 431-432. This Court has repeatedly reaffirmed that interpretation. *E.g., Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986-991 (1988); *Connecticut v. Teal*, 457 U.S. 440, 445-449 (1982); *Dothard v. Rawlinson*, 433 U.S. 321, 328-329 (1977).

Congress enacted the ADEA in 1967, three years after it enacted Title VII. Section 4(a)(2) of the ADEA, 29 U.S.C. 623(a)(2), contains language that is identical to the language in Section 703(a)(2) of Title VII that was construed in *Griggs*, except that the ADEA language substitutes age for the categories of discrimination prohibited by Section 703(a)(2). By adopting the same language that it had used

in Title VII, Congress manifested its intent to extend to older workers the same protection against discrimination that it had extended to the groups protected by Title VII three years earlier. See *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). Because that language has been authoritatively construed by this Court to reach disparate impact discrimination under Title VII, it should receive the same construction under the ADEA.

b. The court of appeals concluded that the ADEA does not prohibit disparate impact discrimination for two reasons. Neither is persuasive.

First, the court concluded that *Hazen Paper* effectively forecloses reliance on disparate impact theory. App., *infra*, 5a-6a. *Hazen Paper*, however, was a disparate treatment case. There, the Court unanimously held that a decision based on a factor that is empirically correlated with age, such as pension status, does not constitute disparate treatment under the ADEA. 113 S. Ct. at 1705. Because the plaintiff in *Hazen Paper* relied solely on a disparate treatment theory of liability, the Court did not address the question whether a decision based on a factor empirically correlated with age could be challenged under a disparate impact theory of liability. *Id.* at 1706. The Court specifically stated that "we have never decided whether a disparate impact theory of liability is available under the ADEA, and we need not do so here." *Ibid.* (citation omitted); see also *id.* at 1710 (Kennedy, J., concurring) (joining the Court's opinion on the understanding that the Court had reserved the question whether disparate impact theory is available under the ADEA).

The court of appeals' conclusion that *Hazen Paper* forecloses reliance on disparate impact theory under the ADEA is inconsistent with this Court's express reservation of that issue.

The court of appeals found it "instructive" (App., *infra*, 5a) that the Court stated in *Hazen Paper* that disparate treatment analysis "captures the essence of what Congress sought to prohibit in the ADEA." 113 S. Ct. at 1707. But that statement simply means that the prohibition of disparate treatment lies at the core of the ADEA. That statement does not answer or even address the question whether the ADEA also prohibits disparate impact discrimination.

The court of appeals also deemed it significant (App., *infra*, 6a-7a) that the ADEA exempts from its prohibitions actions that are based on "reasonable factors other than age." 29 U.S.C. 623(f)(1). In the court's view, that exception "suggests that decisions which are made for reasons independent of age but which happen to correlate with age are not actionable under the ADEA." App., *infra*, 6a-7a. Congress did not, however, create an exception for "any" factor other than age. See *County of Washington v. Gunther*, 452 U.S. 161, 169-171 (1981) (indicating that exception to Title VII for wage differentials based on a use of "any other factor other than sex" may preclude disparate impact analysis of gender-based compensation claims). Rather, it confined the exception to "reasonable" factors other than age. The clear implication of that limitation is that decisions based on factors other than age are subject to challenge under a disparate impact theory when they are not "reasonable," *i.e.*, when they are not job-related within the meaning of *Griggs*.

The Department of Labor, the agency initially charged with enforcing the ADEA, reached precisely that conclusion in its first set of guidelines under that statute. Those guidelines provided that, to qualify as a "reasonable factor other than age," a neutral standard would have to be "reasonably necessary for the specific work to be performed" or "shown to have a valid relationship to job requirements." 29 C.F.R. 860.103(f)(1)(i) and (f)(2) (1969). When the EEOC assumed responsibility for enforcing the ADEA, it adopted the same view. 29 C.F.R. 1625.7(d) (1994). The court of appeals erred in departing from this longstanding interpretation of the "reasonable factors" exception adopted by the agencies charged with enforcing the Act. See *EEOC v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988).

4. The court of appeals also concluded that, even assuming Section 4(a)(2) of the ADEA prohibits disparate impact discrimination, that Section is inapplicable in this case. The court of appeals noted (App., *infra*, 7a-8a) that the present version of Section 703(a)(2) of Title VII makes it unlawful for an employer "to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee," 42 U.S.C. 2000e-2(a)(2) (emphasis added), while Section 4(a)(2) of the ADEA does not contain the italicized phrase. The court of appeals then reasoned that this difference in language indicates that Section 4(a)(2) protects only incumbent employees. App., *infra*, 7a-8a. That reasoning is seriously flawed.

By its express terms, Section 4(a)(2) is not limited to protecting incumbent employees. Although Section 4(a)(2) makes it unlawful for an employer "to limit, segregate, or classify his *employees*," the employer may not engage in such conduct "in any way which would deprive or tend to deprive any *individual* of employment opportunities," 29 U.S.C. 623(a)(2) (emphasis added). The use of the term "individual" rather than "employee" indicates that Section 4(a)(2) protects applicants for employment as well as incumbent employees. The present case illustrates one way in which the text of Section 4(a)(2) protects applicants for employment. Respondent "classif[ies] [its] employees" according to a pay scale that is based on experience, and that practice has had the effect of depriving an "individual" (*i.e.*, an applicant for employment) of an employment opportunity.

Congress's addition of the phrase "or applicants for employment" to Title VII does not detract from that conclusion. Congress added that phrase to Title VII in 1972 as part of a series of amendments to that Act. While Congress made several substantive changes to Title VII in 1972, the amendment to Section 703(a)(2) was technical in nature. As explained in the bill's Section-by-Section analysis, the sole purpose of the amendment was "*to make it clear* that discrimination against applicants for employment * * * is an unlawful employment practice." 118 Cong. Rec. 4943 (1972) (emphasis added). As Congress viewed it, the amendment was "merely * * * declaratory of present law." *Ibid.*

5. The court of appeals' construction of the ADEA significantly limits the scope of the protection afforded by that Act. While the protection against disparate treatment

is of undeniable importance in fulfilling the purposes of the ADEA, that protection alone is incomplete. When facially neutral practices serve as barriers to the employment of older workers and are maintained without a job-related justification, they can have economic and even psychological effects that may be indistinguishable from the effects of intentional discrimination. Congress believed that older workers, no less than those protected by Title VII, are in need of protection from such practices.

Since 1989, the EEOC has filed approximately 20 suits under the ADEA that have relied upon a disparate impact theory of liability. In those suits, the EEOC has challenged the following practices, among others: (1) refusing to consider for jobs those who have previously received a higher salary; (2) refusing to hire persons deemed overqualified; (3) restricting jobs to recent college graduates; (4) laying off persons who are eligible or nearly eligible to retire; and (5) denying job opportunities to those on pensions. Under the construction of the ADEA adopted by the Seventh Circuit, the EEOC would no longer be able to bring challenges of this kind. The unfortunate result would be to dilute significantly the protection against workplace discrimination afforded by the ADEA. This Court should grant review to settle the question whether older workers enjoy the same protection against discriminatory impacts as is applicable under Title VII.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1995

(4)

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

vs.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

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The respondents in this proceeding are named in the caption.

TABLE OF CONTENTS

Page

LIST OF PARTIES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Older Workers Benefit Protectioin Act of 1990 Incorporated the Disparate Impact Principle into the Age Discrimination in Employment Act of 1967 3

A. Introduction – A Chronology 3

B. The Need to Consider Both the ADEA and OWBPA Together to Address the Disparate Impact Concept and the ADEA 13

C. The Waiver Provisions in Title II of OWBPA Are Coherent Only on the Assumption That the Disparate Impact Principle Is Applicable to the ADEA 14

D. Many of the Same Factors That Suggest the Application of Disparate Impact in OWBPA Cases Also Suggest That Congress in 1990 Expected the Disparate Impact Doctrine to Apply in General under the ADEA 20

TABLE OF AUTHORITIES

Page

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001), *cert. granted*, 122 S.Ct. 643 (Dec. 3, 2001) 4

Chevron, U.S.A. v. Natural Resources Defense Council, Inc.
467 U.S. 837 (1984) 7

DiBiase v. SmithKline Beecham Corp.
48 F.3d 719 (3d Cir. 1995) 17

E.E.O.C. v. Francis W. Parker School
41 F.3d 1073 (7th Cir. 1994) 17

Ellis v. United Airlines, Inc.
73 F.3d 999 (10th Cir. 1996) 17

Griggs v. Duke Power Co.
401 U.S. 424 (1971) 6

Hazen Paper Co. v. Biggins
507 U.S. 604 (1993) 12, 18

Laugesen v. Anaconda Co.
510 F.2d 307 (6th Cir. 1975) 7

Lorillard v. Pons
434 U.S. 575 (1978) 4

Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union
53 F.3d 135 (6th Cir. 1995) 17

Markham v. Geller
451 U.S. 945 (1981) 6

McDonnell Douglas Corp. v. Green
411 U.S. 792 (1973) 15

McKennon v. Nashville Banner Publishing Co.
513 U.S. 352 (1995) 4

TABLE OF AUTHORITIES – Continued

Page

Mullin v. Raytheon Co.
164 F.3d 696 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999) 17

Oscar Mayer & Co. v. Evans
441 U.S. 750 (1979) 4

Oubre v. Entergy Operations, Inc.
522 U.S. 422 (1998) 2, 16

Public Employees Retirement System of Ohio v. Betts
498 U.S. 963 (1990) 12, 13

Raczak v. Ameritech Corp.
103 F.3d 1257 (6th Cir. 1997) 14

Runyan v. National Cash Register Corp.
787 F.2d 1039 (6th Cir. 1986) 7

Wards Cove Packing Co. v. Atonio
490 U.S. 642 (1989) 9, 12, 17

STATUTES AND REGULATIONS

29 U.S.C. §§ 621-633a 3

29 U.S.C. § 623(a) 5

29 U.S.C. § 626(f) 3, 14

29 U.S.C. §§ 626(f)(1)(F)(ii) and (H) 9

29 U.S.C. § 626(f)(1)(H)(ii) 10

29 U.S.C § 626(f)(2)(F)(ii) 14

29 U.S.C. § 628 7

42 U.S.C. § 2000e-2(a) 4

29 CFR § 1625.7(d) 6

TABLE OF AUTHORITIES – Continued

Page

46 Fed. Reg. 47725 (1981) 6

52 Fed. Reg. 32293-96 (Aug. 27, 1987) 7

CONGRESSIONAL REPORTS

H. Rep. 101-664, 101st Cong., 2d Sess. 22-23 (Aug. 3, 1990) 8

H. Rep. 101-684, 101st Cong., 2d Sess. 20-22 (Aug. 3, 1990) 8

S. 54, 101st Cong., 1st Sess. 1989 8

S. 1511, 101st Cong., 2d Sess. (April 5, 1990) 10

S. 1511, Cong. Rec., Senate, Sept. 17, 1990, p. S 13242, appearing in S. Prt. 102-33, 102nd Cong., 1st Sess., June 1991, Part 1, p. 157 12

S. Rep. 101-263 on S. 1511, 101st Cong., 2d Sess. (April 5, 1990) 9

PUBLICATIONS

Alfred W. Blumrosen. "Interpreting the ADEA: Intent or Impact." pp. 68-112 in Monte B. Lake, ed., *Age Discrimination in Employment Act, a Compliance and Litigation Manual*, Equal Employment Advisory Council (1982) 5

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TABLE OF AUTHORITIES – Continued

Page

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Alfred W. Blumrosen, Ruth G. Blumrosen, Marco Carmignani, Thomas Daly, *Downsizing and Employee Rights*, 50 Rutgers L. Rev. 943, 953-956, 971-988 (1998) 19

INTEREST OF AMICUS CURIAE*

The Academy of Florida Trial Lawyers is a state-wide voluntary association of more than three thousand attorneys whose practices emphasize litigation for the protection of the personal and property rights of individuals. The Academy has a substantial interest in the application of legal standards relating to the rights of individuals. This case involves a significant question regarding the scope of liability under the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

The question whether the disparate impact principle applies under the ADEA requires consideration of the amendments to that Act made in the Older Workers Benefits Protection Act of 1990 (OWBPA). These amendments were adopted at a time when this court had denied certiorari in a case challenging the application of the doctrine, (with Justice Rehnquist dissenting from the denial); most Courts of Appeal had upheld the principle; and the EEOC, which has substantive rule-making power under the ADEA, had adopted it by regulation after notice and comment which was entitled to *Chevron* deference.

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* The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

Title II of OWBPA addressed the issue of when waivers of ADEA rights by workers would be considered enforceable. Congress recognized that workers subject to a group termination program imposed by the employer were entitled to specific statistics concerning the ages of workers discharged and those who were not. They were given 45 days to consult counsel and consider whether the statistics and other evidence gave rise to a viable ADEA claim. At that point they could waive their ADEA rights and accept the employer's offered settlement, or assert these rights in litigation. Under the disparate impact theory, then considered applicable to the ADEA, the information in these statistics would be very useful. If they suggested disparate impact, and the worker had individualized evidence, an ADEA claim would survive summary judgment. Under these circumstances, the worker and counsel could reasonably assess the viability of the ADEA claim.

Under the disparate treatment theory, worker and counsel could not make such a reasoned judgment because the statistics could not trump the employer's claim of a legitimate reason for the discharge; courts would give summary judgment against workers, who would never have a trial. The statistics required by Congress would not provide worker and counsel with facts to make the kind of judgment for which Congress had provided. To interpose the disparate treatment principle under the ADEA would thus frustrate the Congressional purpose just as the interposition of common law waiver law would have done, had it been allowed, in *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

The OWBPA amendment demonstrates that Congress relied on the disparate impact theory when it created these rights. Given the law as it existed at the time, there was no occasion for Congress to "revisit" an apparently settled question. It proceeded directly to resolve an important conflict in a way that balanced the interests of employers and workers. This balance would be disturbed if the disparate treatment concept – which requires an individualized determination – were interposed in a situation where Congress has required that group termination programs be evaluated by their effect on older workers as a group. This is the office of the disparate impact principle.

ARGUMENT

I. The Older Workers Benefit Protection Act of 1990 Incorporated the Disparate Impact Principle into the Age Discrimination in Employment Act of 1967

A. Introduction – A Chronology

The issue in this case is whether the disparate impact principle developed under Title VII of the Civil Rights Act of 1964 (Title VII) applies under the Age Discrimination in Employment Act (ADEA) of 1967 as amended by the Older Workers Benefits Protection Act of 1990 (OWBPA).[1] The District Court held that as a matter of law, disparate impact claims were not cognizable under the ADEA. The Court of Appeals for the 11th Circuit

[1] 29 U.S.C §§ 621-633a as amended by Pub L. 101-433, 101st Cong., Oct. 16, 1990, 29 U.S.C. § 626(f).

agreed.[2] This Court has frequently noted that Title VII and the ADEA are in pari materia.[3] A chronology relating the two statutes on the issue of disparate impact is an important foundation for the analysis of this question.

1964 Title VII of the Civil Rights Act of 1964 passed; defines unlawful employment practice for an employer as:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin: or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[4]

Legislative history shows that Title VII was intended to invalidate all race, national origin and sex discrimination. This was made clear in the long debate in the Senate when Sen. McClelland proposed an amendment to include the word "solely" before the phrase "because of

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[2] *Adams v. Florida Power Corp.*, 255 F.3d 1322, 1326 (11th Cir. 2001), *cert. granted*, 122 S.Ct. 643 (Dec. 3, 2001).

[3] *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756-758 (1979); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978); *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352 (1995).

[4] 42 U.S.C. § 2000e-2(a).

race, color, religion, sex or national origin." That amendment was soundly rejected.[5]

1967 ADEA of 1967 passed: defines unlawful employment practice as:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . .[6]

Legislative history of the ADEA is replete with statements that it was intended to deal with employer actions based "solely" on age. The primary objective of the law was to attack overt age discrimination policies such as mandatory retirement of workers because they had reached a certain age.[7]

Early District Court opinions under Title VII did not address the disparate impact principle.

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[5] Alfred W. Blumrosen. "Interpreting the ADEA: Intent or Impact." pp. 68-112 in Monte B. Lake, ed., *Age Discrimination in Employment Act, a Compliance and Litigation Manual*, Equal Employment Advisory Council (1982).

[6] 29 U.S.C. § 623(a).

[7] *Blumrosen, supra*, note 5.

1971 This Court adopts the disparate impact principle in interpreting Title VII.[8]

1978 EEOC acquires enforcement responsibility for ADEA from Secretary of Labor. Enforcement of ADEA continues to be based on Fair Labor Standards Act procedure that prohibits most unsupervised waivers of FLSA rights.

1981 This court denies certiorari in *Markham v. Geller*, which had adopted the disparate impact principle in an ADEA case.[9] Justice Rehnquist dissents from the denial.

EEOC regulation 29 CFR 1625.7(d) adopts the disparate impact principle under the ADEA. "When an employment practice, including a test, is claimed as a basis for different treatment of employees or applicants for employment on the grounds that it is a 'factor other than' age, and such a practice has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity. Tests which are asserted as 'reasonable factors other than age' will be scrutinized in accordance with the standards set forth at Part 1607 of this title." The Commentary on the section issued at the time of its adoption, 46 Fed. Reg. 47725 (1981) states that the section, "has been rewritten to make it clear that employment criteria that are age neutral on their face but which nevertheless have a disparate impact on members

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[8] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

[9] 451 U.S. 945 (1981).

of the protected age group must be justified as business necessity. *See Laugesen v. Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971)."

This regulation was issued after notice and comment procedures. EEOC has substantive rule-making authority under the ADEA.[10] After 1984, Chevron doctrine makes these regulations "binding."[11]

1985 EEOC claims to be unable to supervise ADEA settlement agreements which were, by then, being negotiated not only through the commission, but in private negotiation and litigation. Workers' representatives claimed that unsupervised waivers of ADEA violated Fair Labor Standards Act procedures. EEOC proposes a rule to permit such waivers under certain circumstances.

1986 The Sixth Circuit en banc held that such waivers were valid if "knowing and voluntary."[12]

1987 EEOC adopts a rule permitting unsupervised waivers which were "knowing and voluntary," did not release prospective claims, and were not in exchange for consideration to which the employee was entitled. Such waivers could include claims "of which a signing party had actual knowledge and those which could have been discovered upon reasonable inquiry."[13]

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[10] 29 U.S.C. § 628.

[11] *Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[12] *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986).

[13] The Rule, along with the Commission's explanation, appears in 52 Fed. Reg. 32293-96 (Aug. 27, 1987). The rule was

1989 Bills introduced in Congress to permit waivers only where the employee had identified the issues sought to be litigated by filing a charge with EEOC, instituting litigation, or writing a specific complaint to the employer.[14] The rationale was explained in H. Rep. 101-664, 101st Cong., 2d Sess. 22-23 (Aug. 3, 1990). The Report was concerned that

> [E]arly retirees or employees being offered the chance to participate in exit incentive or other group termination programs can effectively be forced to waive their right to file a claim when the employer conditions such participation on the signing of a waiver. The problem is particularly acute in large-scale terminations and layoffs, where an individual employee would not reasonably be expected to know or suspect that age may have played a role in the employer's decision, or that the program may be designed to remove older workers from the labor force. The preemptive waiver of rights occurs before a dispute has arisen and indeed before an employee is even aware of any potential or actual pattern of discrimination. Such a preemptive waiver also may preclude the employee from asserting claims that arise out of subsequent discriminatory conduct by the employer, e.g., hiring younger workers to replace the terminated older workers. These waivers are both unfair and inconsistent with the intent of the ADEA.

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twice suspended by riders to appropriation bills. *See* H. Rep. 101-684, 101st Cong., 2d Sess. 20-22 (Aug. 3, 1990).

[14] S. 54, 101st Cong., 1st Sess. 1989.

* * *

> The House and Senate hearing records are replete with evidence of older workers who have been manipulated or coerced into waiving their rights under the ADEA. This evidence, although anecdotal, paints a disturbing picture of waiver practices. . . . These workers are given no reason to suspect age discrimination and often are not even aware of their rights under the ADEA. For them, waiving all rights and claims through a general release effectively chills any meaningful inquiry into whether they are the victims of unlawful age discrimination.

This Court decides *Wards Cove Packing Co. v. Atonio*,[15] narrowing the perceived scope of the disparate impact doctrine under Title VII.

1990 The Congressional approach to ADEA waivers changed. The Senate Labor Committee reported a bill which created a new category of employees who were asked to waive rights "in connection with an exit incentive or other group termination program offered to a group or class of employees."[16]

With minor modifications this became ADEA Sec. 626(f)(1)(F)(ii) and (H). These employees were given rights beyond those afforded in individualized separation agreements. The primary right was to receive information concerning the ages and job titles of those "eligible or

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[15] 490 U.S. 642 (1989).

[16] S. Rep. 101-263 on S. 1511, 101st Cong., 2d Sess. (April 5, 1990).

selected for the program" and those "not eligible or selected for the program."[17]

The rationale of the Committee Report was:

> In the context of ADEA waivers, the Committee recognizes a fundamental distinction between individually tailored separation agreements and employer programs targeted at groups of employees. Individual separation agreements are the result of actual or expected adverse action against an individual employee. The employee understands that action is being taken against him, and he may engage in arms-length negotiation to resolve any differences with the employer.
>
> Group terminations and reduction programs stand in stark contrast to the individual separation. . . . The trademark of involuntary termination programs is a standardized formula or package of employee benefits that is available to more than one employee. . . . [T]he terms of the programs generally are not subject to negotiation between the parties. . . . [E]mployees affected by these programs have little or no basis to suspect that action is being taken based on their individual characteristics. Indeed, the employer generally advises them that the termination is *not* a function of their individuals status. **Under these circumstances, the need for adequate information and access to advice before waivers are signed is especially acute."** [emphasis added][18]

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[17] 29 U.S.C. § 626(f)(1)(H)(ii).

[18] S. 1511, 101st Cong., 2d Sess. (April 5, 1990), at 32.

The report explained that affected workers were entitled to:

> [D]etailed written information . . . regarding the class of individuals covered by the program, the program's eligibility requirements and any applicable time limits. The employer must include a listing of the job titles and ages of all those individuals eligible or selected for the program, and similar information for individuals who are not eligible. . . .
>
> * * *
>
> The Committee believes that collectively these informational requirements will permit older workers to make more informed decisions in group termination and exit incentive programs. The principal difficulty encountered by older workers in these circumstances is their inability to determine whether the program gives rise to a valid claim under the ADEA. In many circumstances, an older worker will have no information at all regarding the scope of the program or its eligibility criteria. The informational requirements set forth in the bill are designed to give all eligible employees a better picture of these factors.[19]

The language of the bill concerning waivers, Title II of the Older Workers Benefit Protection Act, was agreed to by managers of the bill without floor debate. The statement introduced on September 17, 1990, by Committee Chair Metzenbaum, explained the language that was enacted without change:

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[19] *Id.* at 33-34.

The third and final major theme of the legislation is to assure that older workers will not be coerced or manipulated into waiving their rights as a condition of participating in an exit incentive or other group termination program. The assurance is provided through certain requirements that must be met before older workers lawfully may waive their rights under the ADEA. **The most important requirements are that older workers have adequate information about the exit incentive program and that they have the option to seek legal advice as to whether they should waive their rights.** [emphasis added][20]

The OWBPA was enacted.

The Civil Rights Act of 1990 was passed by Congress, reviving the pre-*Wards Cove* disparate impact doctrine. It was vetoed by President Bush.

1991 The Civil Rights Act of 1991 was enacted, "restoring" the disparate impact doctrine to its pre-Wards Cove contours.

1993 *Hazen Paper Co. v. Biggins* decided by this Court.[21] Chief Justice Rehnquist, Justices Kennedy and Thomas concur, noting that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA."

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[20] S. 1511, Cong. Rec., Senate, Sept. 17, 1990, p. S 13242, appearing in S. Prt. 102-33, 102nd Cong., 1 Sess., June 1991, Part 1st, p. 157.

[21] 507 U.S. 604 (1993).

B. The Need to Consider Both the ADEA and OWBPA Together to Address the Disparate Impact Concept and the ADEA

When Congress used the language from Title VII in the ADEA of 1967 that would be interpreted in 1971 to include disparate impact, it created a situation ripe with ambiguity because of the differing Congressional perceptions of intent under the two acts. Despite the similarity of language, three Justices have doubted that the original ADEA prohibits disparate impact. That question cannot be resolved without consideration of the 1990 amendments to the ADEA in the Older Workers Benefits Protection Act of 1990.

Two specific issues were addressed in the OWBPA. The first was this court's decision in *Public Employees Retirement System of Ohio v. Betts*.[22] Betts appeared to permit employers to discriminate on the basis of age in connection with fringe benefits. Title I of the OWBPA rejected that concept and broadened the coverage of the original ADEA.

The second issue addressed in Title II of the OWBPA involved the circumstances under which unsupervised waivers would be permitted in ADEA cases. The treatment of that issue, most importantly, the creation of a separate category of employee claims "in connection with an exit incentive or other employee termination program offered to a group or class of employees," directly demonstrates the Congressional view that the disparate impact doctrine is applicable to the ADEA.

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[22] 498 U.S. 963 (1990).

C. The Waiver Provisions in Title II of OWBPA Are Coherent Only on the Assumption That the Disparate Impact Principle Is Applicable to the ADEA

In 1990 Congress amended the ADEA to define the circumstances in which waivers of ADEA Rights would be considered "knowing and voluntary."[23] The Sixth Circuit has summed up the intention of Congress aptly:

> "Congress's intent in enacting § 626 [(f) of the ADEA] was to compel employers to provide data so that an employee considering waiving ADEA rights could assess, with the assistance of counsel, the viability of a potential ADEA claim."[24]

The discharged employee will have six weeks to obtain counsel, and enable counsel to discuss the matter with the employer, evaluate the statistics and other available data and assess the viability of the claim. 29 U.S.C. § 626(f)(1)(F)(ii). This is the stage where the difference between the disparate treatment and disparate impact doctrine is crucial. Under the disparate treatment principle, statistics are, "admissable, but rarely determinative . . . and bad statistics alone will not suffice to prove pretext in individual disparate treatment cases."[25] Since many summary judgments in disparate treatment case. are rendered on the issue of pretext, the conclusion that

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[23] 29 U.S.C. § 626(f).

[24] *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1259 (6th Cir. 1997).

[25] 1 Barbara Lindemann and Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 34, and note 131 (3d ed. 1996).

statistics cannot rebut the employer's claim means that the worker cannot obtain a trial on the merits. Applying this body of law to group terminations would frustrate the Congressional purpose discussed above.

This restriction on the function of statistics in individual cases, though followed by the lower courts, may be inconsistent with *McDonnell Douglas Corp. v. Green*.[26] This Court stated that,

> [S]tatistics as to petitioner's employment policy and practice may be helpful to a determination of whether petitioner's refusal to rehire respondent in this case conformed to a general pattern of discrimination against blacks. . . . The District Court may, for example, determine, after reasonable discovery, that "the [racial] composition of defendant's labor force is itself reflective of restrictive or exclusionary practices. . . . " We caution that such general determinations, while helpful, may not be in and of themselves controlling as to an individualized hiring decision, particularly in the presence of an otherwise justifiable reason for refusing to rehire.

If the employee cannot use the statistics that Congress has made available to make a prima facie case, the information about age distribution will not materially aid in making an informed choice between severance pay or litigation. The employee will have to rely on comparative information about individuals known to have been retained or terminated and his or her knowledge may be incomplete.

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[26] 411 U.S. 792, 805 (1973).

Only if the statistical information bears significantly on the question of employer liability can counsel give well grounded advice as to whether to take the money and waive ADEA rights. A reasonable estimate of the likelihood of discrimination cannot be made if plaintiff must prove disparate treatment. The Congressional purpose for requiring the production of the information can be implemented only under a doctrine that permits the worker to establish a prima facie case based on the statistics plus the information known to the employee. That is the "disparate impact" doctrine. It is highly unlikely that Congress would require employers to submit statistics to discharged workers that would not enable them to determine the "viability" of their ADEA claims.

The interposition of the disparate treatment doctrine in situations covered by OWBPA would frustrate the Congressional purpose in just the same way as the interposition of the common law of waivers into OWBPA which was rejected by this Court in *Oubre v. Entergy Operations, Inc.*, where Justice Kennedy pointed out that, "The rule proposed by the employer would frustrate the statute's practical operation as well as its formal command."[27] This was not allowed in *Oubre*; it should not be allowed here.

The 1990 Congress was no stranger to the disparate impact doctrine. In passing the Civil Rights Act of 1990 Congress spent enormous energy addressing the doctrine

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[27] 522 U.S. 422, 427 (1998).

and its implications under Title VII.[28] This act, which was vetoed by President Bush, would have restored the disparate impact doctrine after the *Wards Cove* decision. Yet the same Congress amended the ADEA to address the waiver issue without discussing the disparate impact doctrine.

This Congressional silence may, in the abstract, give rise to conflicting inferences. One is that members of Congress did not intend to introduce the doctrine under the ADEA, since they did not mention it, while they discussed the same concept intensively in the debate on Title VII, and knew "full well" how to include it, had they wished to do so.[29] The other inference is that they did not discuss it because they assumed that the doctrine applied to the ADEA. The assumption was reasonable because the substantive language of the ADEA is the same as Title VII; most Courts of Appeal and the EEOC had applied the disparate impact doctrine under the ADEA; and only one Justice – now Chief Justice Rehnquist – of this court had at that time expressed any doubt about the matter, in a case where this Court denied certiorari.

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[28] *See* Reginald C. Govan, *Honorable Compromises And The Moral High Ground: The Conflict Between The Rhetoric And The Content Of The Civil Rights Act Of 1991*, 46 Rutgers L. Rev. 1 (1993).

[29] *See, e.g., Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir.), *cert. denied*, 528 U.S. 811, 120 S.Ct. 44, 145 L.Ed.2d 40 (1999); *E.E.O.C. v. Francis W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *Lyon v. Ohio Educ. Ass'n and Prof'l Staff Union*, 53 F.3d 135, 139 n. 5 (6th Cir. 1995).

The reality is that Congressional attention in 1990 was focused on overruling specific Supreme Court and EEOC decisions. The disparate impact doctrine of Title VII had been watered down by the Wards Cove decision. Thus it attracted Congressional attention. There was no comparable Supreme Court decision concerning disparate impact under the ADEA. These different Title VII and ADEA issues were considered in separate statutes. It is difficult to determine which of the assumptions about Congressional intention is valid, under these complex conditions.[30] The Congressional intention does appear in the identification of a new class of workers subject to an "exit incentive or other employee termination program offered to a group or class of employees." These workers are provided with information and time to make a major life decision concerning the likelihood of age discrimination. Congress clearly distinguished between individual cases falling under the disparate treatment analysis, and the newly recognized affected group of terminated workers – the traditional basis for the disparate impact doctrine under Title VII, now explicitly recognized under the ADEA.[31] Only under the disparate impact doctrine will the statistics provide a solid basis for making the

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[30] The "post Hazen" cases (*see* note 28, *supra*) rejecting the disparate impact doctrine under the ADEA rely heavily on Hazen, even though Hazen explicitly declined to make such a blanket ruling. Hazen itself did not address the impact of the OWBPA on the original ADEA and thus cannot be authority, or even persuasive, on an issue that was not raised in Hazen itself.

[31] Alfred W. Blumrosen, *Modern Law: The Law Transmission System And Equal Employment Opportunity*, 79-83, 258-260 (Univ. of Wisconsin Press, 1993).

choice of suing or taking severance pay. Under the disparate impact doctrine, when a showing of such impact is made, the employer must demonstrate the legitimacy of its actions. Statistics showing such impact and evidence of the workers' situation suffice to survive summary judgment.

If the issue is to turn on the intention of the employer, the best that an attorney can do is speculate that something might turn up to prove the intent, and then advise the employee whether to gamble. The Committee Reports strongly suggest that the opportunity for a discharged worker to gamble was not the object of OWBPA.[32]

Requiring proof of intent in these cases would also produce an anomaly. Workers claiming age discrimination would have a more difficult time establishing discrimination in a downsizing than would workers suing over race, sex and national origin discrimination. But the ADEA is the only anti-discrimination statute where Congress has expressly sought to facilitate the evaluation of ADEA claims by requiring employers to produce statistics showing the effect of the program.

The prospects for discrimination on the basis of age in connection with a downsizing are at least as great as the prospects for race and sex discrimination. Yet requiring intent in age cases would make it more difficult for older workers to pursue discrimination claims than for

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[32] *See* Alfred W. Blumrosen, Ruth G. Blumrosen, Marco Carmignani, Thomas Daly, *Downsizing and Employee Rights*, 50 Rutgers L. Rev. 943, 953-956, 971-988 (1998).

minorities and women. This unlikely result reinforces the suggestion that Congress intended that employer liability in such "group exit or incentive" programs be based on disparate impact. Even if intent of the Congress that enacted the ADEA of 1967 was to prohibit only intentional discrimination, that should not control the interpretation of the 1990 Amendment concerning an issue that no one anticipated in 1967.

D. Many of the Same Factors That Suggest the Application of Disparate Impact in OWBPA Cases Also Suggest That Congress in 1990 Expected the Disparate Impact Doctrine to Apply in General under the ADEA

By 1990, there was substantial agreement among the lower courts and the EEOC that the disparate impact doctrine applied to the ADEA, and only one Justice of this Court had suggested otherwise. The Court itself had denied certiorari in 1981 on the same question. If there is to be any presumption about the assumptions that Congress made in 1990 about the issue, it surely must run in favor of the disparate impact principle. But Congress cannot legislate by an amendment that seeks to codify existing law without saying so. There must be tangible evidence of that intent. The tangible evidence in this case consists of the example given above concerning the interpretation of the waiver doctrine in light of the disparate impact principle to vindicate the clear intention that the statistics provided to discharged workers be sufficient to create a prima facie case, else they fail to provide

substantial grounds for the discharged worker's decision about whether to waive or litigate.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

No. 01-584

IN THE
SUPREME COURT OF THE UNITED STATES

WANDA ADAMS, LEO L. FLOYD, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,
Respondents.

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BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), AMERICAN JEWISH CONGRESS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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44 pp

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY 4

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly 5

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination 6

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA 7

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS 9

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs 10

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination 12

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA 14

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination 18

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION 20

A. Stereotyping Is Often Unintentional 23

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Pages**

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001) ..... *passim*

Albermarle v. Moody,
422 U.S. 405 (1975) 25, 30

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469 U.S. 287 (1985) 20

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477 F.2d 1245 (D.C. Cir. 1973) 20

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507 U.S. 619 (1993) 9

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939 F. Supp. 113 (D.P.R. 1996) 9

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467 U.S. 837 (1984) 16

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457 U.S. 440 (1982) 4, 26

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48 F.3d 719 (3d) *cert. denied*, 516 U.S. 916 (1995) ... 28

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4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*,
179 F.3d 1348 (11th Cir. 1999) 22

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433 U.S. 321 (1977) 28

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515 U.S. 1142 (1995) 21, 23, 26

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623 F. Supp. 734 (D.C. Pa. 1985) 5

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460 U.S. 226 (1983) 10, 11, 21

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cert. denied, 517 U.S. 1245 (1996) 6, 7, 8, 19, 21

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529 U.S. 120 (2000) 16

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429 U.S. 125 (1976) 4

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328 U.S. 61 (1946) 9

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971 F.2d 818 (1st Cir. 1992),
cert. denied, 506 U.S. 1052 (1993) 5

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401 U.S. 424 (1971) 4, 11, 19, 26, 30

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507 U.S. 604 (1993) 10, 20, 21, 22

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498 U.S. 133 (1990) 5

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533 U.S. 289 (2001) 16

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431 U.S. 324 (1977) 25

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471 F.2d 84 (5th Cir. 1972) 6

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480 U.S. 616 (1987) 9

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434 U.S. 575 (1978) 5

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513 U.S. 352 (1995) 2, 6, 29, 30

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504 U.S. 374 (1992) 5

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164 F.3d 696 (1st Cir.) *cert. denied*,
528 U.S. 811 (1999) 6, 21

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404 U.S. 116 (1971) 9

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412 U.S. 427 (1973) 5, 6

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522 U.S. 422 (1998) 2

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490 U.S. 228 (1989) 7

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530 U.S. 133 (2000) 2

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650 F. Supp. 482 (D.D.C. 1986) 20

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487 U.S. 977 (1988) 7, 20

STATUTES AND LEGISLATIVE HISTORY

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29 U.S.C. § 621(a) 11
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No. 01-584

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INTEREST OF *AMICI CURIAE*[1/]

AARP is a nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's

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[1/] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amici curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them.

This case is of utmost importance to AARP's members. More than 40 percent of AARP's members remain active in the work force. Most are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-633. The vigorous enforcement of the ADEA is of paramount importance for the millions of older workers who rely on the Act to deter and remedy invidious age bias in the work place. Since 1985, as part of its advocacy efforts, AARP has filed more than 200 *amicus curiae* briefs in this Court and in the federal district and appellate courts regarding the proper interpretation and application of the ADEA. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998), *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

This brief is also submitted on behalf of the American Association of University Professors (AAUP), the American Jewish Congress, the National Council of La Raza, the National Association For the Advancement of Colored People (NAACP), the National Partnership for Women & Families, and the National Women's Law Center, all of which support the rights of older workers to be free from employment discrimination, whether on grounds of race, gender, national origin, religion, or age. The statements of interest of these *amici* are included in the appendix to this brief.

Denying the disparate impact method of proving age discrimination to its victims will thwart the intent of Congress,

insulate from challenge discriminating conduct which Congress has deemed devastating to individuals, society, and the national economy, and undermine the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Since the consequences of discrimination are equally devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination.

Amici urge the Court to reject suggestions that age discrimination in the work place is so fundamentally different from other forms of employment discrimination that it can be adequately addressed by the disparate treatment theory alone. Holding that the ADEA encompasses both disparate treatment and disparate impact claims would be in complete harmony with the ADEA's congressional purpose as well as its legislative roots.

For these reasons, *Amici Curiae* respectfully submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

In order to fully implement the will of Congress expressed in the ADEA, older workers must have the right to pursue both disparate treatment and disparate impact claims. While the court below concluded that Congress limited ADEA claimants to the disparate treatment theory of proof, there is no persuasive evidence of such limits in either the text or legislative history of the ADEA. In light of the fact that this Court did not even articulate the disparate impact theory until four years *after* the enactment of the ADEA, the unavailability of the disparate impact method of proving age discrimination cannot be based on Congress' failure to mention "disparate impact" in either the text or legislative history of the ADEA.

Those courts that have restricted ADEA plaintiffs to the disparate treatment theory of proof have attributed to Congress

an intent to differentiate between ADEA claimants and Title VII claimants th[illegible] is found nowhere in either statute. They have misapplied conventional tools of statutory construction. They have selectively misread the ADEA's legislative history, which, contrary to their conclusions, contains strong affirmative support for the disparate impact theory. And, they have failed to recognize how the function and purpose of the disparate impact theory, as articulated by this Court, is perfectly suited to policing what the Court has stated it considers to be the "essence" of age discrimination. These failures bolstered the erroneous conclusion that Congress did not intend the disparate impact theory to apply to the ADEA -- a result which Congress never contemplated.

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY.

Section (4)(a)(2) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This language is the mirror image of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e(2)(a): the only difference being that the ADEA substitutes the word "age" for the words "race, color, religion, sex, or national origin." In *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971), the Court cited § 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ." 401 U.S. at 431. The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976).

In *Griggs*, the Court declared: "The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." 401 U.S. at 429 (emphasis added). Accordingly, "[i]f the existence of the disparate impact approach is apparent from the 'plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA." *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 741 (D.C. Pa. 1985).

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly.

"The similarity in language [between § 623(a)(2) of the ADEA and § 703(a)(2) of Title VII] . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144-45 (1990); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way."). The doctrine of *in pari materia* is especially appropriate for the ADEA and Title VII given that the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). *See also Arnold v. U.S. Postal Serv.*, 863 F.2d 994, 1003 (D.C. Cir. 1998) (Garth, J., dissenting) ("That the ADEA's coverage and provisions are substantially similar to the provisions of Title VII is no accident. The similarity between these two statutes flows from the fact that the ADEA was modeled after Title VII, relying on much of Title VII's actual language for its content.").[2/]

[2/] One textual difference between the ADEA and Title VII that courts have relied on to deny the disparate impact theory to age discrimination victims is § 623(f)(1) of the ADEA. This provision provides that employers may make decisions based upon "reasonable factors other than age." The provision is fully consonant with the disparate impact method of proving

(continued...)

The conclusion that identical language in the ADEA and Title VII was intended to prohibit the same forms of discrimination is bolstered by the fact that in addition to "shar[ing] common substantive features," the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, the Court reasoned that interpreting statutes with similar language *pari passu* is particularly appropriate when "the two provisions share a common *raison d'etre*." (citing *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination.

The ADEA's substantive prohibitions, which were based directly on those in Title VII, state in pertinent part, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). In rejecting disparate impact analysis under the ADEA, the Tenth Circuit in *Ellis v. United Airlines, Inc.*, without citing any authority, declared that "[t]he most obvious reading of the clause, 'because of such individual's age,' is that it prohibits an employer from intentionally treating someone differently based on his or her age." 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996). *See also Mullin v. Raytheon, Co.*, 164 F.3d 696, 700 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999) ("A commonsense reading of ['because of such individual's age'] strongly suggests that the statute includes a requirement of intentional discrimination.").

[2/] (...continued)
age discrimination and in fact, mirrors disparate impact analysis. *Amici* fully agree with the arguments in the National Employment Lawyers Association's (NELA) *amicus curiae* brief that the RFOA provision supports a claim of disparate impact under the ADEA.

The problem with the Tenth Circuit's "obvious reading," and the First Circuit's "commonsense reading" of the statute, however, is that they are in direct conflict with this Court's construction of the identical language contained in Title VII, which likewise prohibits discrimination "because of" a protected characteristic. "The Supreme Court has repeatedly found the phrase 'because of' to permit disparate impact analysis, reasoning that the phrase codifies the requirement of a causal connection between the protected trait and the challenged employment practice." Keith R. Fentonmiller, "The Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims, 47 AM. U. L. REV. 1071, 1121 (1998). *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) ("The persuasion burden [under disparate impact analysis] must remain with the plaintiff, for it is he who must prove that it was '*because of* such individual's race, color, [etc.],' that he was denied a desired employment opportunity.') (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)).[3/] "The causal connection is required in every discrimination case, no matter what the method of proof." Fentonmiller, at 1121.

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA.

In *Ellis v. United Airlines, Inc.*, one of the cases the court below found "persuasive," *Adams v. Florida Power Corp.*, 255

[3/] *Accord Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) (plurality opinion) (interpreting words "because of" contained in Title VII's prohibition against sex discrimination to encompass "indirect stumbling block[s] to employment opportunities." such as in disparate impact cases challenging facially-neutral tests or qualifications); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-92 (1988) (plurality opinion) (holding that "an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination," because "[i]n both circumstances, the employer's practices may be said to adversely affect [an individual's] status as an employee, *because of* such individual's [protected class]" (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added).

F.3d 1322, 1326 (11th Cir. 2001), the Tenth Circuit concluded that in failing to add a parallel provision to the ADEA when it enacted the Civil Rights Act of 1991 (CRA),[4] Congress "signal[ed] its intent not to provide for a disparate impact cause of action under the ADEA." 73 F.3d at 1008. The CRA added a provision to Title VII to define the burden of proof in a disparate impact case. Congress' failure to codify disparate impact analysis in the ADEA when it enacted the CRA does not, however, evince an intent to limit the doctrine to Title VII. There is simply no evidence that the issue was ever considered. As fully explained in Fentonmiller, 47 AM. U. L. REV. at 1126-28, arguments to the contrary do not bear scrutiny in logic and are not supported by the legislative history of the CRA.

Prior to the enactment of the CRA, Title VII did not mention disparate impact. And as Fentonmiller points out:

> even as amended, Title VII fails to state explicitly that an employment practice resulting in unjustified disparate impact is unlawful; the CRA did not alter the prohibitory language section 703(a) of Title VII. . . . Thus, any application of the disparate impact theory under Title VII still must invoke the Supreme Court's long-standing construction of section 703(a) as prohibiting practices that are fair in form, but discriminatory in operation.

47 Am. U. L. Rev. at 1128.

If there is any inference to be drawn from Congress' actions or inactions in 1991, it is that the CRA's failure to define disparate impact and explicitly make it an unlawful employment practice demonstrates a strong congressional belief that disparate impact analysis already was encompassed by the prohibitory language which has been in the statute since 1964. *Id.* As previously explained, that language prohibits discrimination, whether proved through disparate treatment or

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[4] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

disparate impact analysis. Since the absence of the words "disparate impact" in Title VII prior to 1991 did not make disparate impact analysis any less legitimate under Title VII, the same should be true for the ADEA after 1991.

Legislative restraint provides another plausible explanation for the CRA's silence with regard to disparate impact analysis under the ADEA. Specifically, "[t]he 1991 amendments responded to several Supreme Court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA, as no court had ever found disparate impact analysis unavailable to ADEA plaintiffs." *Camacho v. Sears Roebuck*, 939 F. Supp. 113, 120 (D.P.R. 1996). In such circumstances, the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *NLRB v. Plasterers' Local Union No 79*, 404 U.S. 116, 129-30 (1971) quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). *See also Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 629 (1987) (Scalia, J., dissenting) ("*any* reliance on congressional failure to act is necessarily a 'canard.'") (emphasis in original).

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS.

Despite the strong textual similarity between the ADEA and Title VII, courts questioning "disparate impact" as a valid theory under the ADEA have looked to its legislative history, and in particular, to a Report by U.S. Labor Secretary W.

Willard Wirtz,[9] on which Congress drew heavily in crafting the ADEA. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d at1325; *see also* Respondent's Brief in Opp. at 14 (asserting importance of Wirtz Report). *Accord Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Hazen Paper's analysis of legislative history concerning the disparate impact issue was necessarily limited, because only a disparate treatment claim was before the Court. *See* 507 U.S. at 610. However, no such explanation exists for the superficial analyses of the ADEA's legislative history in *Adams* and other appellate decisions squarely addressing the availability of the disparate impact theory. A fresh analysis by this Court is now warranted. Its conclusions should be harmonized with the diverse and powerful evidence supporting disparate impact claims under the ADEA, including Congress' determination to outlaw all age discrimination shown to be "arbitrary," whether in its intent or its effects.

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs.

In *EEOC v. Wyoming*, the Court recounted the ADEA's early legislative history, including unconsummated efforts to "ban discrimination on the basis of age as well as race, color, religion, sex, and national origin" in Title VII of the 1964 Civil

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[9] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) (hereinafter "Wirtz Report"), *reprinted* in Joint Appendix ("JA") at 350-416. The Wirtz Report was compiled after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act. Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

Rights Act. 460 U.S. 226, 229, 230-32 (1983).[9] The Wirtz Report, the principal document establishing Congress' purpose in enacting the ADEA, *id.* at 229-231, clearly recognized as arbitrary facially neutral policies and practices falling more harshly on older workers.

The Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; these were endorsed by President Johnson and culminated in the 1967 law enacted by Congress. *Id.* at 230-32. For instance, the ADEA's preamble, 29 U.S.C. § 621(a), summarizes findings in the Wirtz Report on "individual and social costs of age discrimination." *Id.* at 231. Likewise, the ADEA's text paraphrases strategies endorsed in the Report: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

The ADEA's focus on banning "arbitrary" discrimination anticipates the articulation in *Griggs* of "disparate impact" as a method for the "removal of artificial, *arbitrary*, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431 (emphasis added). The term "arbitrary discrimination" originated with Congress' directive to the Secretary requiring a report on age bias: ". . . The Secretary of Labor shall make a report to the Congress . . . containing the results of such study and shall include in such report such recommendations for legislation to prevent *arbitrary discrimination* in employment because of age as he determines advisable." JA 354. (emphasis added).

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[9] Efforts at the federal level "date back at least to the 1950s," *Id.* at 229 and n.2. In 1903 Colorado became the first state to adopt an age discrimination law applicable to employment; by 1965 twenty states and Puerto Rico had such laws. JA 374-75.

In the Wirtz Report "arbitrary discrimination" is identified as the "kind [of bias] which might be dealt with by a statute prohibiting discrimination in employment on the basis of age." JA 398. The Secretary also described "arbitrary discrimination" as the conduct most comparable to employment discrimination banned by the 1964 Civil Rights Act. Specifically, "arbitrary discrimination" was defined as the "non-employment" or "rejection" of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* 355 (emphasis in original). The Report discussed at length findings of a special study of express – *i.e.*, intentional – age limits in employment.[7] However, the Report also condemned employer conduct with the same result – lesser opportunity for older workers – but involving unintentional discrimination.

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination.

Secretary Wirtz pinpointed the most serious danger to employment of older workers as "advancing science" and "changing technology." These, he explained, lead employers to adopt new job requirements difficult for older workers to meet; however, such criteria may be unrelated to actual job needs. JA 359-60. Thus, the Report described as unjust one of the precise job criteria held unlawful six years later in *Griggs* on a theory of disparate impact: a high school graduation requirement for new employees, unjustified in terms of applicants' ability to do the job, and falling more harshly on members of a protected group, some of whom were qualified by virtue of experience, but few of whom graduated high school. *Id* 359.

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[7] The study looked at 500 firms in five cities in those states without age bias statutes in order to assess "the most obvious," but not the only serious kind of age discrimination in employment: "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." JA 364-65.

The logic of Wirtz' concern is clear: in a U.S. labor market where educational attainment was (and still is) growing rapidly among younger workers, older workers consistently will fall short. The Secretary therefore concluded, "[a]ny employment standard" based on educational attainment "will obviously work against the employment of many workers – unfairly, if despite his limited schooling, an older worker's years of experience have given him the relevant equivalent [qualifications]." JA 359. In similar fashion, the Wirtz Report addressed effects of "aptitude and other entrance tests" on older workers, concluding:

> there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Id. 387. Secretary Wirtz reasoned that some jobs require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... rose with age." *Id.* 388.

Even if Secretary Wirtz in 1965 did not identify the "disparate impact" method of proof that this Court recognized as a means to combat "arbitrary discrimination" in 1971, his Report clearly acknowledged that age-neutral job criteria could produce "arbitrary discrimination" against older workers even though such criteria might be founded simply on faith in "'progress,'" JA 358-59, rather than age-based animus. By describing such age-neutral bias as "arbitrary," the Report clearly supported it being banned in what became the ADEA.

The Wirtz Report also specifically found evidence of "arbitrary discrimination" in still other types of employment policies and practices involving unintentional bias against older workers. With regard to "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers, " JA 389, the Report stated broad concern about "arbitrary"

discrimination. In particular, Secretary Wirtz opined that "[t]he practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity." *Id.* Similarly, the Report observed with regard to employer benefit plans that:

> The extent to which the range of pension-plan induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

Id. 397.

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA.

Secretary Wirtz took advantage of several opportunities to provide guidance for interpreting the ADEA. Following the ADEA's enactment, the Secretary supervised issuance of two sets of materials highly relevant to interpretation of the new law. First, the Department of Labor promulgated interpretative regulations, *see* 29 C.F.R. Part 860 (1968), within days after the ADEA went into effect. Second, in the months following the ADEA's enactment, the Department began issuing interpretive opinion letters. Both sources strongly reaffirmed language in the Report to the effect that the ADEA was intended to ban age-neutral, non-job-related, employment practices with adverse disparate impact on older workers.

The regulations required, *inter alia*, with regard to physical requirements: (a) that age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) that a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c)

that pre-employment physical examinations distinguish between the physical demands of various jobs.[8/] In addition, the regulations provided that age-neutral employment evaluation criteria like quantity of output, quality of production, or educational level had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[9/]

The regulations also clarified an important aspect of the Wirtz Report. In the Secretary's discussion of express age limits, he noted that

> [a] significant proportion [are] arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.

JA 368. The Report enumerated nine such employer "defenses" of age limits, eight of which (other than "Desired age balance in the work force") have no direct connection to age. *Id.* 369. Thus, the regulations confirm, as suggested in the Report, that even after the enactment of the ADEA, most age

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8/ These provisions, 29 CFR § 860.103(f)(1)-(2), "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Fentonmiller, 47 AM. U. L. REV. at 1104 and 195, 196 (quoting WR at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" to Congress in June 1965 along with and in support of the Report. *See* JA 352.

9/ In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, 47 AM.U. L. REV. at 1104-05 and nn. 198-200 (quoting Research Materials at 81, and citing *id.* at 14, Wirtz Report at 3 [JA 358-60].

limits made unlawful by the Act could be defended on age-neutral grounds, thus raising the issue how to assure that the "arbitrary discrimination" many of them represented could be challenged. The regulations did *not* answer this question by directing attention to the intentional discrimination such neutral rules might mask, consistent with the later-developed "disparate treatment" method of proof. Rather, the regulations identified guidelines for identifying which neutral rules with adverse impact on older workers are justified by employer needs, consistent with the later-developed "disparate impact" theory of proof.[10/] The EEOC's current ADEA regulations are to the same effect, as Judge Barkett recognized in her *Adams* concurrence. That is, they recognize that the "reasonable factors other than age" defense "works in tandem with the business necessity defense in the disparate impact analysis." 255 F.3d at 1328.[11/]

These regulations are entitled to substantial deference in interpreting the ADEA's text, to the extent the Court decides that language employing traditional methods of statutory construction is ambiguous authorized. *Chevron USA v. Natural Resources Def. Council*, 467 U.S. 837, 843 n.9 (1984). *See INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290 n.45 (2001); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132 (2000) (where an agency responsible for administering a statute

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[10/] The same can be said of the regulations as revised in early 1969 to clarify, for example, that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable." 29 C.F.R. § 860.104(b) (1969).

[11/] Congress reassigned responsibility for administering the ADEA from the Department of Labor to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1979). Current regulations require that employment practices with an adverse impact on individuals 40 and over that are defended as based on reasonable factors other than age "can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (2001). And if an employment test has such adverse impact, it must be validated according to the Uniform Guidelines on Employee Selection Procedures *See id.* § 1607 (2001).

has issued rules interpreting it, and Congress has not expressed its intent "unambiguously," the "reviewing court must respect the agency's construction of the statute so long as it is permissible"). *See also Adams,* 255 F.3d at 1328 and n.10 (Barkett, J., concurring).

Also in 1968, Secretary Wirtz' Department of Labor issued several advisory opinions regarding ADEA implementation confirming the view that age-neutral employer practices were subject to the Act. These declared, *inter alia,* that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, 47 AM.U. L. REV. at 1104 and n.204 (citing Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968) and Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968)).

Wirtz consistently urged that the ADEA be interpreted broadly, in order to root out unfair and arbitrary treatment of older workers. In 1976 Congressional hearing testimony, former Secretary Wirtz lamented the lack of progress in eliminating barriers to age bias in the workplace and concluded: "there is more reason now, not less, for rigorous enforcement of the ADEA."[12/] The Secretary also expressed expansive views of age discrimination legislation in his 1967 testimony, stating that the purpose of the proposed ADEA was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits;" he wondered "whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is

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[12/] *Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging,* 94th Cong. 2d Sess. 81 (1976).

that that individual is seeking."[13/] In the 1965 Report, at the outset of his "Conclusions and Recommendations," Wirtz declared:

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

JA 403. Yet, that would be the precise result if the Eleventh Circuit's ruling is affirmed.

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination

The Eleventh Circuit cited two grounds related to legislative history for its affirmance of the district court's conclusion that the ADEA does not permit liability to be established by the disparate impact method of proof. Each is unfounded. First, the court opined that the Wirtz Report differentiated between proof now known as disparate treatment and disparate impact and recommended that Congress only ban the former. Second, the court alleged that the history of the ADEA differs materially from that of Title VII, "which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact."

The *Adams* court's oversimplified rendering of the Wirtz Report ignores numerous instances in which the Report condemns as "arbitrary" and called for the elimination of disparate impacts of neutral employer practices on older workers. As demonstrated *supra* at 12-14, it was clear error to suggest that the Report concluded that "arbitrary

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13/ *Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare*, 90th Cong. 51-52 (1967). Secretary Wirtz also asserted that the labor market was "putting more and more people with more and more competence and capacity out to pasture earlier and earlier."

discrimination" corresponds only with "disparate treatment based on stereotypical perceptions of the elderly," or that all other "factors affecting older workers, such as policies with disparate impact, should be addressed in alternative ways." 255 F.3d at 1325. Rather, the Report mapped out a more complex taxonomy of age discrimination, in which some "arbitrary" age bias is explicit, but some is founded on actions of an "unthinking majority," JA 358, and still more is premised on unjustifiable – but age-neutral – reliance on tests, physical and educational criteria and other factors unrelated to a worker's productivity or ability to do the job in question. Thus, in the Secretary's view, some policies that have what we now call "disparate impact," amounted to arbitrary bias and constituted an appropriate target for legal liability.

The *Adams* court also endorsed a superficial analysis of the Wirtz Report in *Ellis*. The *Ellis* court asserted, without explanation that "arbitrary discrimination" equals intentional bias and all factors affecting "older workers more strongly as a group" equals disparate impact. *See Ellis*, 73 F.3d at 1008 (citing Wirtz Report at 5, 11) *See* JA 361-62, 378. Hence, neither *Ellis* nor *Adams* reflects an accurate reading of the Report; any review of the Secretary's background "Research Materials;" any consideration of Wirtz' 1967 Senate testimony (or any other legislative records of Congress' original enactment of the ADEA); any analysis of the 1968 interpretive regulations – also penned by Secretary Wirtz; or of the 1968 advisory opinions issued by Wirtz' Labor Department. Surely some greater effort was necessary to justify the *Adams* court's cavalier use of terms invented years after the ADEA's enactment in 1967 – "disparate treatment" and "disparate impact" – to interpret a report issued in 1965.

The *Adams* court compounded its error by characterizing as alien to the Wirtz Report, and thus to the legislative history of the ADEA, a key aspect of Congress' work in enacting Title VII: attention to whether a challenged job requirement had "'a manifest relationship to the employment in question.'" 255 F.3d at 1325-26 (quoting *Griggs*, 401 U.S. at 432). Yet the very same concern drove Secretary Wirtz to catalogue various harms to older workers, including some due to neutral

employer practices, and to condemn all those he deemed "arbitrary," precisely because they had no basis in "ability to do a job." JA 355. Hence, the legislative records of both Title VII and the ADEA support reliance on the disparate impact method of proof.

Finally, regardless how one reads the legislative history, the prohibitions in § 4 of the ADEA, 29 U.S.C. § 623, do not contain the word "arbitrary." Instead, the prohibitory language mirrors that of Title VII. Consequently, the specific prohibitory language of § 4 trumps any contrary inference that may arise from the legislative history or in language in the findings and purpose section of the statute. *See Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973); *Samuels v. Dist. of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986).

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION.

In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that the disparate impact theory of proof is necessary to combat "the problem of subconscious stereotypes and prejudices," 487 U.S. 977, 990 (1988), because they cannot be "adequately policed through disparate treatment analysis."[14/] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co.*, 507 U.S. at

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14/ *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act since discrimination against the handicapped results from thoughtlessness not animus) (emphasis added).

610[15/] the disparate impact theory must be available to attack the serious problem of age discrimination in the work place.[16/]

Much of the confusion appears to arise from the Court's comment in *Hazen Paper* that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," 507 U.S. at 610. Based on that language, which was not central to the decision, several courts have wrongly inferred that "the ADEA only prohibits intentional discrimination." *Ellis*, 73 F.3d at 1008. *See also Mullin*, 164 F.3d at 701("the inescapable implication of [Justice O'Connor's] statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA."). These courts erred in taking such a giant leap from dictum on the nature of age discrimination.

First, while there can be no question that *one* of the reasons Congress enacted the ADEA was to combat discrimination based on "stereotypes unsupported by objective fact," *EEOC v. Wyoming*, 460 U.S. at 231, there is no basis in either the

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15/ In *EEOC v. Wyoming*, the Court also recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes." 460 U.S. at 231; *see* JA 368-71. The Report elaborated that explicit age limits often were defended on age-neutral grounds, which non-age-based rationales were "undoubtedly believed to be in many cases" the true explanations of age limits. *Id.* 369.

16/ Judge Cudahy recognized this seemingly obvious contradiction in his dissent from *EEOC v. Francis W. Parker School*: "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes,' . . . This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." 41 F.3d 1073, 1080-81 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (emphasis in original). *See also* Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 309 (1990) ("[T]he assertion that age discrimination results from unconscious stereotyping arguably cuts in favor of, not against, the application of disparate impact in age cases.").

language or the legislative history of the ADEA to restrict its reach to employment decisions based on stereotypes.[17] Surely it was not the intent of this Court in *Hazen Paper* to thwart the will of Congress by grafting an additional criterion of proof onto the ADEA, severely curtailing the Act's broad protections.[18]

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[17] Taken at face value, this Court's comments are corroborated in the legislative record of the ADEA, which featured prominently the seemingly nationwide phenomenon of "persistent and widespread use of age limits in hiring." JA 364-67, 404. Yet the very same can be said of Congress' proceedings in enacting Title VII. That is, "facially-race discriminatory employment practices [were] the primary impetus behind the passage of Title VII in 1964," yet "[o]bviously disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions." Fentonmiller, 47 AM.U. L. REV. at 1112; *see* Kamenshine, 42 FLA. L. REV. at 291("in the same way Congress was preoccupied with overt racial policies when it outlawed race discrimination under Title VII"). It follows that Congress' and Secretary Wirtz's attention to "overt age restrictions as the most glaring age-based obstacles," *id.*, should not limit the reach of the ADEA.

[18] Incredibly, courts have gone even further and required ADEA plaintiffs to produce evidence that the employer's decision was motivated by inaccurate and stigmatizing stereotypes about older workers. *See, e.g., Dilla v. West*, 4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*, 179 F.3d 1348 (11th Cir. 1999) (holding that employer did not violate the ADEA when it refused to hire applicants based on their proximity to retirement eligibility because "the mere fact that there exists a perfect correlation, or even a direct link, between age and the factor purportedly relied upon by the employer," *id.* at 1142-43, does not mean the employer impermissibly relied on age given that "age discrimination occurs *only* when 'the problem of inaccurate and stigmatizing stereotypes' about older workers are operative.") *Id.* at 1142 (emphasis added).

A. Stereotyping Is Often Unintentional.

Since actions based on stereotypes are not necessarily intentional,[19] it is erroneous to conclude that because inaccurate stereotypes are often behind age discrimination the ADEA only prohibits intentional discrimination. Actions based on stereotypes can be, and more often than not are, unintentional, and the disparate impact theory is particularly well-suited to combat discrimination caused by unintentional stereotyping. After all, the premise of the disparate impact theory is that "not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1080 (J. Cudahy, dissenting). This is especially true of age discrimination. Applying the disparate impact theory to the ADEA is consistent with the research on the nature and causes of ageism.[20]

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[19] The argument that disparate impact is inappropriate where discrimination is caused by stereotypes, not animus, "jeopardize[s] the availability of disparate impact in gender cases as well because gender discrimination, like age, is based more on paternalistic stereotypes than on malevolence." Kaminshine, 42 FLA. L. REV. at 310 (footnote omitted). For that matter, while "race discrimination is steeped in a history of unparalleled hatred and bigotry . . . race discrimination today is often based on the same kind of stereotypes and group-based assumptions about ability that form the basis of age discrimination." *Id.*

[20] The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975). Butler describes ageism as:

> a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . Ageism allows the younger generations to see older people as different from themselves; thus they

(continued...)

> Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent. Age discrimination . . . typically results from employers' ignorance about older workers, rather than active dislike of them. Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers.

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155, 222 (1986).

Recent research has focused on this unconscious age discrimination, also called "implicit ageism." "'[I]mplicit ageism' is defined as the thoughts, feelings, and behaviors toward elderly people that exist and operate without conscious awareness or control, with the assumption that it forms the basis of most interactions with older individuals." Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578, 578 (Oct. 2001). In a related study, the authors explained:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such 'automatic' ageism may be hard to eradicate if it has been incoporated into our implicit personality theories or social schemata and is evoked without awareness on our part.

20/ (...continued)

> subtly cease to identify with their elders as human beings.

Id. at 12.

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990). Unconscious ageism is pervasive in our society. "Ageism permeates our culture so thoroughly and conditions our attitudes and perceptions so much that most of us are unaware of most of the ageism in it." Erdman B. Palmore, AGEISM: NEGATIVE AND POSITIVE 98 (2d ed. 1999).

Unconscious discrimination is not unique to age discrimination. Like ageism, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . ." Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism," 33 STAN. L. REV. 317, 330 (1987).21/ However, "[a] survey of implicit ageism found that 95% of the participants had negative views of old people . . . a higher proportion than for implicit racism or sexism." Levy, at 578.

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes.

It is well established in Title VII jurisprudence that disparate impact is a valuable tool in ferreting out subtle forms of discrimination. *See, e.g., In re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)). Indeed, this Court long ago recognized that disparate impact may serve as an effective method of identifying intentional bias that is well hidden. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer refusal to follow alternative

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21/ *See* Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Chalenges and Cultural Change," 100 YALE L.J. 1731, 1764-68 (1991) for a discussion of studies establishing unconscious sexism.

workplace practice with lesser discriminatory impact is evidence that the challenged practice was merely a "pretext" for discrimination); *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (same).[22/]

The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Kamenshine, at 318. "If individuals are not aware that a negative stereotype of age has been automatically triggered by a person's older age, they are likely to attribute their behaviors (e.g., failure to hire. . .), to another factor that better fits their preferred self-images as reasonably fair individuals. Thus, rather than acknowledge that 'I hired a younger person in preference to an older person,' a rationalization, such as the older applicant's personality or training, might be evoked." Levy, at 578. *See also* Perdue, & Gurtman, at 200 ("characterizing the aged as unemployable, unintelligent, and 'naturally' unhealthy may help to rationalize discriminatory practices in employment . . . ."). As one commentator observed with regard to the same phenomenon in the context of race discrimination:

> When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents . . . . But when the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

22/ *See also Adams*, 255 at 1327 (in *Griggs* "the Supreme Court recognized that although discriminatory intent could be hidden, *even from the decisionmaker himself*, its effects in the workplace could not.") (Barkett, J. concurring) (emphasis added); *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1078 ("Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. ... Ultimately, the EEOC must show that Parker's rationale is pretextual and ... is predicated on some stereotype, conscious or *unconscious*") (emphasis added).

Lawrence, 39 STAN. L. REV. at 349. Disparate impact is just as crucial to combating age discrimination as it is to challenging prejudice based on race, national origin, or sex. "People are more conscious of these latter biases but often are unaware of their age bias. Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 26-27 (2001).

Those circuits that have precluded the application of disparate impact to ADEA cases "seem to assume that only barriers based on animus create problems. But one can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have 'status quo' based on animus that should be swept away." Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75, 94 (1999).

If ADEA claims can be established only through disparate treatment analysis, with the requisite proof of conscious discriminatory purpose, individual discrimination claims will not be able to address the issue of unconscious prejudice and the "essence" of age discrimination will be insulated from challenge. Indeed, if as this Court suggested age discrimination is most often caused by stereotypes, then "a theory that tests only for intentional discrimination necessarily misses its mark much of the time." David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899, 903-04 (1993). The end result is a "status quo" of age bias based on unconscious stereotyping. Indeed, research on age stereotyping suggests that we have already reached such a "status quo." Such research demonstrates that most individuals harbor specific beliefs about older people, that most of those beliefs are inaccurate, and that the stereotypes have persisted in disadvantaging older persons for decades.[23/] For example,

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23/ J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION

(continued...)

research on age stereotyping in employment has consistently found that older employees are almost always treated and rated less favorably than younger employees.[24/]

The claim that older workers do not suffer from "the entrenched effects of past discrimination"[25/] is a flawed basis for discarding disparate impact theory under the ADEA. As this Court itself has recognized, "We have not limited this principle [that some facially neutral employment practices are unlawful even in the absence of discriminatory intent] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson*, 487 U.S. at 988.[26/]

[23/] (...continued)
AGAINST THE ELDERLY 70-96 (1980).

[24/] *See, e.g.*, Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999); Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8(4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996); William C. Levin, "Age Stereotyping," 10(1) RESEARCH ON AGING 134 (March 1988); Bruce J. Avolio & Gerald V. Barrett, "Effects of Age Stereotyping in a Simulated Interview," 2 PSYCHOLOGY AND AGING, March 1987, at 56; Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976); Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976).

[25/] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995).

[26/] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (height and weight requirements had a disparate impact on women; a decision that had nothing to do with historical discrimination).

The Wirtz Report also provides several answers to the argument that ageism lacks any history of entrenched bias. First, the Report documents a substantial record of "persistent and widespread" discrimination dating back at least to the beginning of the century. JA 374, 404. Second, it describes in detail the reasons why "arbitrary" age bias is entrenched: pervasive irrational employer stereotypes, conscious and unconscious, discounting the capacity of older workers to perform on the job. *Id.* 368-73. Further, the perpetuation rationale fails to account for the fact that Title VII addresses characteristics in such a way as to cover all workers, including whites, males, and other groups that have not been victimized by entrenched, historic patterns of invidious discrimination.

Moreover, whether or not stereotypes are rooted in history is irrelevant to the debilitating effect those stereotypes have on older persons. Although ageism may be primarily a twentieth century phenomenon, stereotypes about older persons are ingrained and commonplace in our society. The perpetuation rationale also loses much of its appeal as time marches on and age discrimination remains a pervasive force in our society. The ADEA was enacted 35 years ago, yet, age discrimination in employment continues to impede the achievement of equality in the work place.[27/] "Like racism and sexism, ageism remains recalcitrant, even if below the surface. But it can be – and has been – churned up from its latent position."[28/]

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.*, the Court declared that "Congress designed the remedial measures in [the

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[27/] *See, e.g.*, Robert Manor & T. Shawn Taylor, *Age-Bias Complaints Up Sharply Older Workers' Higher Salaries are Big Targets for Employers*, CHICAGO TRIBUNE, July 15, 2001, at C1; Stan Hinden, *Forced to Retire Before You're Ready The Merge-and-Downsize Era's Layoffs Hit Older Workers Especially Hard*, WASH. POST, June 6, 1999, at H01.

[28/] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138, 140 (1989).

ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Without the disparate impact theory to challenge subtle forms of age discrimination, employers will not be encouraged to examine policies which adversely effect older workers, but instead will continue to ignore them so that rather than being eliminated, the last vestiges of age discrimination will likely become entrenched "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed. *Amici* urge this Court to rule that the disparate impact theory of proof is applicable to the ADEA.

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January 24, 2002

APPENDIX

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards covering academic freedom, tenure, institutional governance, freedom from discrimination, and other key issues in higher education. *See, e.g., On Discrimination* and *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP Policy Documents & Reports (9th Ed., 2001). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that the unavailability of the disparate impact method of proof under the Age Discrimination in Employment Act (ADEA) would undermine the ability of professors to ensure freedom from age discrimination in the academic workplace.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared as both plaintiff and *amicus curiae* before this Court and other courts throughout the nation in numerous civil rights cases.

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, which is an "umbrella organization" for more than 270 local affiliated community-based organizations (CBOs) and about 33,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our

individual associates, NCLR serves as a voice for all Hispanic subgroups in all regions of the country. As a civil rights organization, NCLR is vitally concerned with the maintenance of a strong, vigorous, and active federal civil rights enforcement system. NCLR believes that the proper use of the disparate impact standards is essential to protecting Hispanics, older workers, and other groups covered by Title VII of the Civil Rights Act and other laws prohibiting employment discrimination, from bias in the workplace.

The American Jewish Congress is an organization of American Jews that seeks to protect fundamental constitutional freedoms, particularly the civil rights and liberties of American Jews and all Americans. Since Jews in America are an aging population, the American Jewish Congress is particularly concerned with issues that affect the welfare of older Americans. In this connection it has called attention to such problems as nursing home abuses, problems with Medicare, and issues involving the effectiveness of various state agencies administering laws banning age discrimination; and has filed briefs in this Court in such cases as *Cruzan v. Director, Missouri Department of Health.*

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and minorities in employment.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as amicus curiae in numerous cases involving employment law and civil rights issues.

Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

(6)

No. 01-584

IN THE
Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

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40 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY 3

ARGUMENT 4

I. DISPARATE IMPACT CLAIMS EFFECTIVELY POLICE ARBITRARY DISCRIMINATION .. 4

II. THE REASONABLE FACTORS DEFENSE IN ADEA § 4(f)(1) ESTABLISHES THE PROCEDURAL AND SUBSTANTIVE RESPONSE TO FACIALLY NEUTRAL POLICIES THAT DISCRIMINATE IN VIOLATION OF ADEA § 4(a). 8

A. Reading the Language "To Take Any Action Otherwise Prohibited" and "Factors Other Than Age" Together Connotes an Affirmative Defense to a Claim of Discrimination From a Non-Age or Neutral Factor. 10

1. The Prefatory Language "Any Action Otherwise Prohibited" Creates an Affirmative Defense to a Violation of ADEA § 4(a), 29 U.S.C. §623(a). 11

2. The Placement of the RFOA Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense 15

3. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate. 16

B. This Court's Analysis of the Equal Pay Act Supports A Claim of Disparate Impact Under the ADEA. 19

C. The Term "Reasonable Factor" in ADEA Section 4(f)(1) Requires The Employer to Show That the Age-Neutral Factor is Job-Related. 22

III. REGULATIONS CONTEMPORANEOUS WITH PASSAGE OF THE ADEA RECOGNIZE THE STATUTE PROHIBITS AGE-NEUTRAL PRACTICES THAT ADVERSELY AFFECT OLDER WORKERS, UNLESS JUSTIFIED AS JOB-RELATED UNDER THE SECTION 4(f)(1) DEFENSE. 25

CONCLUSION 30

TABLE OF AUTHORITIES

CASES

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001). 7, 22

Adreani v. First Colonial Bankshares Corp.,
154 F.3d 389 (7th Cir. 1998) 23

Alexander v. Sandoval,
___ U.S. ___, 121 S. Ct. 1511 (2001) 5

Burlington Industries v. Ellerth,
524 U.S. 742 (1998). 2

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). 4, 30

Connecticut v. Teal,
457 U.S. 440 (1982) 27

Corning Glass Works v. Brennan,
417 U.S. 188 (1974) 19, 20, 21

County of Washington v. Gunther,
452 U.S. 161 (1981) 19, 20, 21

DiBiase v. SmithKline Beecham Corp.,
48 F.3d 719 (3d Cir. 1995) 7

Dothard v. Rawlinson,
433 U.S. 321 (1977) 3

EEOC v. Frances W. Parker School,
41 F.3d 1073 (7th Cir. 1994). 7, 22

EEOC v. Local 350, Plumbers & Pipefitters,
998 F.2d 641 (9th Cir. 1992) 9

EEOC v. Massachusetts,
987 F.2d 64 (1st Cir. 1993) 9

Ellis v. United Air Lines Inc.,
73 F.3d 999 (10th Cir. 1996) 7, 22, 27

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) 2

General Electric Co. v. Gilbert,
429 U.S. 137 (1976). 27

Griggs v. Duke Power Co.,
401 U.S. 424 (1971). ..... *passim*

Hazen Paper Co. v. Biggins,
507 U.S. 604 (1993). 23

King v. St. Vincent's Hospital,
502 U.S. 215 (1991) 15

Kolstad v. American Dental Association,
527 U.S. 526 (1999). 2

Kungys v. United States,
485 U.S. 759 (1988). 17

Lanning v. Southeastern Penn. Transp. Authority,
181 F.3d 478 (3rd Cir. 1999) 30

Lorillard v. Pons,
434 U.S. 575 (1978). 3, 5

Mahoney v. Radio Free Europe/Radio Liberty, Inc.,
818 F. Supp. 1 (D.D.C. 1992), *rev'd on other grounds*,

47 F.3d 447 (D.C. Cir. 1995) 15

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973). 9, 16

McKennon v. Nashville Banner Publishing Co.,
513 U.S. 352 (1995). 5

Miranda v. B&B Cash Grocery Store,
975 F.2d 1518 (11th Cir. 1992) 21

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No. 01-584

IN THE
SUPREME COURT OF THE UNITED STATES

WANDA ADAMS, LEO L. FLOYD, *et al.*,
Petitioners,
v.
FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The National Employment Lawyers Association (NELA), founded in 1985, is a voluntary organization of over 3,500 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters.

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[1] The consents of the parties have been filed with the Clerk of the Court. In compliance with Rule 37.6 of this Court, *amicus curiae* National Employment Lawyers Association (NELA) states that no counsel for either party authored any portion of this brief. No persons other than the *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

As part of its advocacy efforts, NELA regularly supports precedent setting litigation affecting the rights of individuals in the workplace. NELA has filed numerous *amicus curiae* briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that the laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court in which NELA has participated as *amicus curiae* are: *Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133 (2000), *Kolstad v. American Dental Association*, 527 U.S. 526 (1999), *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998), and *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998).

NELA members represent many of the individuals who bring claims under the federal civil rights statutes, including the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. NELA members see firsthand the harmful effects of discrimination on ordinary workers. Those devastating effects occur regardless of whether the employer acted intentionally or unintentionally or whether the discrimination is overt or subtle, explicit or neutral, conscious or subconscious. Indeed, the most pernicious and invidious forms of discrimination are the most subtle and unintentional acts, which warrant a strong response if age discrimination is ever to be eliminated.

The disparate impact method of proving discrimination is that effective response. Disparate impact theory provides an important mechanism for policing arbitrary practices and stereotypes, which is critical to achieving the goals of the Age Discrimination in Employment Act.

SUMMARY OF ARGUMENT

The ADEA's prohibitions broadly define discrimination by tracking the language of Title VII's prohibitions. *Lorillard v. Pons*, 434 U.S. 575, 577 (1978). There is no dispute that Title VII prohibits discrimination in facially neutral practices that have a disparate impact on members of a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). Since the statutory prohibitions are *in para materia*, the ADEA should be interpreted similarly to Title VII to permit proof of discrimination using the disparate impact method. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979).

The real issue is the appropriate defense to a claim that a facially neutral policy has a disparate impact based on age. NELA maintains that the ADEA's provision "reasonable factors other than age," 29 U.S.C. § 623(f)(1) (RFOA), establishes the substantive and procedural response to a disparate impact claim under the ADEA. The specific language of the RFOA "to take any action otherwise prohibited" together with "factors other than age" presumes that a violation of ADEA Section 4(a) has been established due to the adverse effects on age of a neutral employment practice. The language as well as the placement of the RFOA with the affirmative defenses in ADEA Section 4(f)(1), 29 U.S.C. §623(f)(1), strongly supports the conclusion that the RFOA is an affirmative defense on which the employer bears the burden of proof.

The ADEA's defenses provide the proper standards for determining which discrimination is arbitrary and unlawful and which discrimination is justified, as Congress confirmed in the 1990 amendments to the ADEA.[2/] Rejecting the reasoning and holding in *Public Employees Retirement System v. Betts*, 492

[2/] Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, §§ 101-03 (1990) (hereinafter "OWBPA").

U.S. 158 (1989), Congress made clear that it was improper to restrict the ADEA's prohibitions by a narrow view of "arbitrary discrimination" or by the statute's defenses.[3] Adherence to Congress' directives leads to the conclusion that the ADEA prohibits discrimination in facially neutral practices, with the RFOA defense determining whether such discrimination is arbitrary or may be excused.

Interpreting the ADEA to cover disparate impact claims with the RFOA as an affirmative defense to such claims is further supported by regulations issued just days after the Act took effect in 1968. *See* 33 Fed. Reg. 9172 (June 21, 1968). The Department of Labor regulations, 29 C.F.R. §§ 860.103-104 (1970), interpreting ADEA Sections 4(a) and 4(f)(1) are entirely consistent with the statute and its legislative history. The regulations should be given considerable weight in interpreting the statute given their issuance so close in time to the implementation of the statute, *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and their issuance by the same administration that drafted the legislation and the report documenting the problems of age discrimination in both facially discriminatory and facially neutral practices. *See Zubar v. Allen*, 396 U.S. 168, 192 (1969).

ARGUMENT

I. DISPARATE IMPACT CLAIMS EFFECTIVELY POLICE ARBITRARY DISCRIMINATION.

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[3] *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990, at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 LEGISLATIVE HISTORY OF THE OLDER WORKERS BENEFIT PROTECTION ACT OF 1990, at 240-41 (1990) (hereinafter "OWBPA LEG. HIST.").

The disparate impact method of proof serves the important purpose of removing "artificial, arbitrary, and unnecessary barriers to employment," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), that may be linked to protected status.[4] Disparate impact theory ferrets out purportedly neutral standards that operate as the functional equivalent of overtly discriminatory classifications.[5] Allowing plaintiffs to prove discrimination using the disparate impact method further helps "police" "subconscious stereotypes and prejudices," because a "facially neutral practice adopted without discriminatory intent, may have effects that are indistinguishable from intentionally discriminatory practices." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990 (1988). Finally, disparate impact theory provides an important alternative to disparate treatment because evidence of discriminatory motive is often rare and elusive.[6]

It is well established that the "ADEA and Title VII share common substantive features and also a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357-58 (1995). Indeed, the substantive prohibitions of ADEA § 4(a), 29 U.S.C.

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[4] Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 317 (1990).

[5] *Id.* at 318.

[6] "Many policies whose very intent is to discriminate are framed in a race-neutral manner. It is often difficult to obtain direct evidence of this motivating animus.... As I have said before: 'Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor.' *Washington v. Davis*, 426 U.S. 229, 253 (1976)." *Alexander v. Sandoval*, 121 S. Ct. 1511, 1530, n. 13 (2001) (Stevens, J., dissenting).

§ 623(a), were derived *in haec verba* from Title VII.[7/] Interpretations of the substantive provisions of Title VII apply with "equal force" to the ADEA's substantive prohibitions. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985). Thus, courts have consistently and uniformly applied the same method of proof developed for Title VII disparate treatment cases to ADEA cases. *See Reeves v. Sanderson Plumbing Products, Co.*, 530 U.S. 133, 142 (2000); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985).

Despite the parallel purposes and almost identical prohibitions of the ADEA and Title VII,[8/] the court below and other courts have held that the ADEA does not permit the disparate impact method of proving discrimination by showing that a facially neutral policy had a disproportionate effect on

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7/ *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978) ("There are important similarities between the two statutes, to be sure, both in their aims — the elimination of discrimination from the workplace — and in their substantive prohibitions.") (Footnote quoting 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1) and citing the comparison between 42 U.S.C. § 2000e-2(a)(2) and 29 U.S.C. §623(a)(2).).

8/ The only difference in the language of the prohibitions (other than the ADEA's use of the term "age") is that Title VII § 703(a)(2), 42 U.S.C. §2000e-2(a)(2), was amended. in 1972 to add the term "applicants." Pub. L. No. 92-261, § 2, 86 Stat. 103 (1972). *Compare* 42 U.S.C. § 2000e-2(a)(1) and 29 U.S.C. § 623(a)(1) and 42 U.S.C. § 2000e-2(a)(2) and 29 U.S.C. § 623(a)(2). The difference should be inconsequential, since the Court construed Title VII § 703(a)(2) to apply to applicants in *Griggs v. Duke Power Co.*, 401 U.S. 424, 426-27 & n. 1 (1971), prior to the addition of the term "applicants" to Title VII in 1972.

age.[9/] The premier reason relied upon by the court below and other courts is the presence of the "reasonable factors other than age" provision in ADEA § 4(f)(1), 29 U.S.C. §623(f)(1) (hereinafter RFOA),[10/] which Title VII does not contain.[11/] These courts effectively read the RFOA defense as limiting the prohibitions in ADEA § 4(a), 29 U.S.C. §623(a), to intentional discrimination.[12/]

The court below and other courts rejecting disparate impact as a method of proof for ADEA claims make several fundamental errors. First, they do not give effect to the specific language or context of the ADEA's defense for "reasonable factors other than age." 29 U.S.C. § 623(f)(1). NELA's brief focuses exclusively on the RFOA defense and submits that the RFOA provides the appropriate affirmative defense to a disparate impact claim under the ADEA.

Second, these courts erroneously take a narrow view of "arbitrary discrimination" by ignoring Title VII case law and the ADEA's legislative history that "arbitrary discrimination" encompasses facially neutral policies, unintentional

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9/ *See Adams v. Florida Power Corp.*, 255 F.3d 1322, 1325-26 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696, 700-01 (1st Cir. 1999); *Ellis v. United Air Lines Inc.*, 73 F.3d 999, 1006-07 (10th Cir. 1996); *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir. 1995); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1076-77 (7th Cir. 1994).

10/ *Id.*

11/ Title VII incorporates from the Equal Pay Act a defense that permits wage differentials based on a "any other factor other than sex." 29 U.S.C. § 206(d)(1) (2000).

12/ *Mullin v. Raytheon Co.*, 164 F.3d 696, 702-03 (1st Cir. 1999); *EEOC v. Frances W. Parker School*, 41 F.3d 1073, 1077 (7th Cir. 1994).

discrimination, and subconscious stereotyping. NELA endorses the amicus brief of AARP which provides ample support from the legislative history of the ADEA and literature on stereotyping that the ADEA's prohibitions and purposes were designed to reach discrimination in all of its forms.

Given the parallelism of the ADEA's prohibitions and purposes to Title VII, ADEA Section 4(a)(2) should be interpreted like Title VII to permit disparate impact claims when a facially neutral practice adversely affects older workers based on age. The differences in the defenses of the ADEA and Title VII do not change the meaning or scope of the definition of discrimination and the types of claims that can be raised under the prohibitions.

The real issue is not whether the ADEA permits disparate impact claims, but what is the appropriate defense to such a claim under the ADEA, to which we now turn.

II. THE REASONABLE FACTORS DEFENSE IN ADEA SECTION 4(f)(1) ESTABLISHES THE PROCEDURAL AND SUBSTANTIVE RESPONSE TO FACIALLY NEUTRAL POLICIES THAT DISCRIMINATE IN VIOLATION OF ADEA § 4(a).

Section 4(f)(1) of the ADEA states:

"It shall not be unlawful for an employer, employment agency, or labor organization ---

(1) *to take any action otherwise prohibited* under subsection (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or *where the differentiation is based on reasonable factors other than age*....

29 U.S.C. § 623(f)(1) (2000) (emphasis added) (RFOA).

The RFOA defense in the ADEA has remained unchanged since the 1967 enactment of the statute. There is virtually no legislative history explaining the provision[13] and a dearth of case law closely examining it.[14]

While the RFOA provision has not been the subject of much litigation, it has generated considerable confusion among the courts. Some courts view the provision as the same as a "legitimate, nondiscriminatory reason,"[15] which is the employer's response in a case of circumstantial proof of disparate treatment under the model of proof developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Employers have asserted the provision as a defense to discriminatory policies, whether the policies used age explicitly[16] or implicitly.[17]

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[13] Howard Eglit, *The Age Discrimination in Employment Act's Forgotten Affirmative Defense: The Reasonable Factors Other Than Age Exception*, 66 B.U.L. Rev. 155, 193 (1986).

[14] In *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408-09, n.10 (1985), the Court granted certiorari to consider the burden of proof applicable to the RFOA provision, but declined to reach the issue. Judicial analysis of the RFOA defense by the lower courts has been sketchy and mixed. 2 HOWARD C. EGLIT, AGE DISCRIMINATION §5.15 (2d ed. 1995).

[15] Eglit, *supra* note 14, § 5.19, at 5-73, n. 334 (collecting cases).

[16] *See EEOC v. Massachusetts*, 987 F.2d 64, 73 (1st Cir. 1993) (physical exam at age 70 not a RFOA).

[17] *See EEOC v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 648 (9th Cir. 1992)(rejecting RFOA defense to union hiring hall policy that required retirees to cease receiving pensions, since pension receipt was conditioned on age).

The plain meaning of, context of, and contemporaneous regulations interpreting the RFOA provision strongly support construing the provision as an affirmative defense to a claim that "factors other than age" led to discrimination because of age in violation of ADEA § 4(a), 29 U.S.C. § 623(a).

A. Reading the Language "Any Action Otherwise Prohibited" and "Factors Other Than Age" Together Connotes an Affirmative Defense to a Claim of Discrimination From a Non-Age or Neutral Factor.

The prefatory language of the RFOA provision "to take any action otherwise prohibited" clearly signifies an "affirmative defense."[18] The condition precedent to the affirmative defense is the establishment of a violation of the statute's prohibitions, specifically ADEA §§ 4(a), (b), (c), or (e), 29 U.S.C. §§ 623(a), (b), (c), or (e). The "factor other than" criterion of the defense connotes that the violation involves a non-age factor that causes discrimination because of age, which is precisely a claim of disparate impact. The RFOA defense fits as the statutory response to a claim that a neutral employment practice or policy adversely affected older individuals because of age in violation of the ADEA's prohibitions, 29 U.S.C. §§ 623(a), (b), (c), or (e).

1. The Prefatory Language "Any Action Otherwise Prohibited" Creates an Affirmative Defense to a Violation of ADEA § 4(a), 29 U.S.C. §623(a).

The RFOA begins with a specific proviso: "to take any action otherwise prohibited." 29 U.S.C. §623(f)(1). This prefatory phrase means that the RFOA does not come into play until a violation of an ADEA prohibition has been established. When a party seeks to have a violation excused by asserting an exception to liability, that party typically bears the burden of

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[18] 1 OWBPA LEG. HIST., at 253, 348.

proving that its conduct falls within the exception. *See United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

Congress clearly views the prefatory language "to take any action otherwise prohibited" as creating an affirmative defense. Based on its understanding of this proviso, Congress added this very language to ADEA § 4(f)(2), 29 U.S.C. § 623(f)(2), in the Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 103(1) (1990), to clearly make ADEA § 4(f)(2) an affirmative defense.[19]

Prior to 1990, ADEA § 4(f)(2) did not include the proviso language from ADEA §4(f)(1). ADEA § 4(f)(2) stated:

> It shall not be unlawful for an employer, employment agency, or labor organization ... to observe the terms of a bona fide seniority system or any bona fide employee benefit plan... which is not a subterfuge to evade the purposes of this Act....

29 U.S.C. §623(f)(2) (1989).

The OWBPA's amendment to ADEA § 4(f)(2), 29 U.S.C. §623(f)(2), adding the proviso from its sister provision, §4(f)(1), 29 U.S.C.§ 623(f)(1), is important because it reflects Congress' understanding of the meaning and effect of a key phrase in § 4(f)(1). Congress used the proviso language from § 4(f)(1) to make unmistakably clear that the addition of this language to § 4(f)(2) imposed two conditions: (1) the condition precedent of a violation of § 4(a), and (2) the employer bore the burden of establishing the elements of the defense.[20] In so

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[19] *Id.*

[20] *See* S. Rep. No. 101-263, at 29-30 (1990), *reprinted in* 1 OWBPA LEG. HIST. at 348-49; H.R. Rep. No. 101-664 (1990), at 46-47, *reprinted in* 1 OWBPA LEG. HIST., at 253-54.

doing, Congress confirmed its understanding that the prefatory language in § 4(f)(1) had the same effect.[21/]

The OWBPA amendments to the ADEA further signify Congress' view of the proper analysis to apply in construing the ADEA's defenses related to the Act's prohibitions and purposes. The amendments demonstrate congressional intent to broadly define discrimination in the ADEA's prohibitions and to use the Act's defenses to set the standards for determining when that discrimination is arbitrary and unlawful or may be excused.

In enacting the OWBPA, Congress expressly disagreed with this Court's reasoning and conclusion in *Public Employees Retirement System v. Betts*, 492 U.S. 158, 181 (1989), that ADEA § 4(f)(2) merely redefined the conduct prohibited by ADEA § 4(a). In *Betts*, the Court interpreted the employee benefit plan provision in ADEA § 4(f)(2) to "redefine[] the elements of a plaintiff's prima facie case instead of establishing a defense to what otherwise would be a violation of the Act." 492 U.S. at 181. The Court reached this conclusion based on the language of § 4(f)(2) under which a bona fide employee benefit plan could not be a "subterfuge to evade the purposes of the Act." 29 U.S.C. § 623(f)(2) (1989). Focusing on the ADEA's purpose to prohibit arbitrary discrimination, the Court reasoned that discrimination in employee benefits was not the type of arbitrary discrimination that was intended to be covered in the general prohibitions of ADEA § 4(a).

Congress emphasized that the Court's analysis and interpretation of the ADEA's purpose, prohibition, and defense

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21/ In passing the OWBPA, Congress also expressed its approval of the circuit court decisions and the EEOC's regulations concluding that the 'reasonable factors other than age' exception included in section 4(f)(1) was an affirmative defense for which the employer bears the burden of proof. *Id.*

were, with all due respect, incorrect. The OWBPA "explicitly and completely rejects both the reasoning and the holding in *Betts*." 1 OWBPA LEG. HIST., at 20 (Statement of Managers Explaining the Bill). The OWBPA rejected a narrow reading of the ADEA's purpose to prohibit "arbitrary discrimination"as a basis for restricting the reach of the ADEA's prohibitions. Congress confirmed that the "ADEA's purpose of eliminating arbitrary age discrimination in employment includes the elimination of age discrimination in all forms of employee benefits."*Id.*

The OWBPA also provides clear congressional confirmation that the ADEA's prohibitions are to be interpreted "like the comparable provisions of Title VII" because the ADEA's prohibitions were taken *in haec verba* from Title VII. H.R. Rep. No. 101-664, at 33 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240 (1990). To reinforce the continued parallelism between the ADEA's prohibitions and Title VII's prohibitions, Congress deliberately did not amend ADEA § 4(a) in 1990. *Id.* Instead, to correct the Court's holding that § 4(a) did not cover discrimination in employee benefits, Congress added a definitional provision to include employee benefits within the meaning of the § 4(a) phrase "compensation, terms, conditions, or privileges of employment." Pub. L. No. 101-433, § § 102 (1990), codified at 29 U.S.C. §630(l).

To correct the Court's reasoning and holding that discrimination in employee benefits was not arbitrary, Congress amended the ADEA's defense for employee benefit plans, 29 U.S.C. §623(f)(2)(B) (2000), not the ADEA's prohibitions. The defense defines the circumstances under which an employer could justify age discrimination in employee benefits. *See* S. Rep. No. 101-263, at 17-18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 336-37 (1990); H.R. Rep. No. 101-664, at 33-34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 240-41 (1990). In amending ADEA § 4(f)(2), Congress emphasized that the defense "provides a sound mechanism for harmonizing two purposes of the ADEA ...: eradicating arbitrary discrimination based on age and promoting the hiring of older persons." *Id.*

Finally, the OWBPA overturns the Court's conclusion that ADEA § 4(f)(2), 29 U.S.C. §623(f)(2), was a definitional provision and not a defense, by explicitly imposing the burden of proof on the employer to establish the elements of § 4(f)(2). Pub. L. No. 101-433, § 103 (1990), codified as 29 U.S.C. §623(f)(2). In *Betts*, the Court reasoned that the seniority system provision in ADEA § 4(f)(2), like the seniority system provision in Title VII §703(h), 42 U.S.C. §2000e-2(h), was a definitional provision and not an affirmative defense. *Betts*, 492 U.S. at 181-82. The OWBPA specifically overturns this reasoning by reiterating that all of the defenses in ADEA §4(f)(2) are true affirmative defenses on which the employer bears the burden of persuasion to establish the elements of the defense. *See S.1511 Final Substitute: Statement of Managers*, 1 OWBPA LEG. HIST., at 25 (1990).[22/]

The prefatory language of ADEA § 4(f)(1) belies a construction that the RFOA provision merely defines the statute's prohibitions. Congress clearly views the proviso "to take action otherwise prohibited" as establishing an affirmative defense to a violation of Section 4(a). The placement of the RFOA defense contiguous with the other defenses in ADEA §4(f) further demonstrates congressional intent that the RFOA provision operates as an affirmative defense.

[22/] The versions of the OWBPA prior to final passage included ADEA §§ 4(f)(1) and (3) and specifically imposed the burden of proof for ADEA § 4(f)(1) on the employer. *See* S. Rep. No. 101-263, at 2 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 321 (1990); H.R. Rep. No. 101-664, at 3 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 210 (1990). The final Statement of Managers deletes reference to ADEA §§ 4(f)(1) and (3) from the bills because the *Betts* decision did not interpret those provisions. *See S.1511 Final Substitute: Statement of Managers*, *id.* at 25.

2. The Placement of the RFOA Contiguous to the ADEA's Affirmative Defenses Strongly Supports Construction of the Provision as an Affirmative Defense.

The placement of a provision within the context of the statute provides particular insight into its meaning. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991) ("[T]he meaning of statutory language, plain or not, depends on context."). The RFOA provision of the ADEA is sandwiched between the bona fide occupational qualification provision and the foreign workplace provision. This Court has repeatedly held that the BFOQ provision is an affirmative defense. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 416 n. 24 (1985); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The foreign workplace provision has also been recognized as an affirmative defense.[23/] The juxtaposition of the RFOA provision with these other affirmative defenses certainly suggests that it too is an affirmative defense.

The BFOQ and RFOA provisions have been juxtaposed to each other from the earliest drafts of the ADEA proposed by the Johnson Administration.[24/] Their contiguous relationship is no

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[23/] The foreign workplace defense was added to the ADEA in 1984 by § 802(c)(1) of the Older Americans Act Amendments of 1984, Pub. L. No. 98-459, 98 Stat. 1767, 1792. *See Mahoney v. Radio Free Europe/Radio Liberty, Inc.*, 818 F. Supp. 1, 4 (D.D.C. 1992), *rev'd on other grounds*, 47 F.3d 447 (D.C. Cir. 1995) (construing foreign employee provision as an affirmative defense). *See also* Eglit, AGE DISCRIMINATION, § 5.61 at 5-276 (2d ed. 1995).

[24/] *See* H.R. 90-13054 & S. 90-830 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 94 & 127.

accident, and implies that the defenses were joined together to be interpreted similarly.[25]

The first part of ADEA § 4(f)(1) provides an affirmative defense to classifications that are facially discriminatory. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985). The action "otherwise prohibited" by § 4(a) is explicit from the use of age in the terms of the policy or practice. *Id.* The BFOQ defense in § 4(f)(1) provides the appropriate response to intentional discrimination because the employer admits it used age as a qualification, but seeks to justify its action by showing that the use of age as a criterion is bona fide and reasonably necessary to the operation of the business. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 411 (1985).

The "reasonable factors other than age" defense provides the second part of ADEA Section 4(f)(1). Again, the prefatory language requires that an action violating § 4(a) has been established. The language in the RFOA provision "factor other than age" connotes that the second part of ADEA Section 4(f)(1) responds to classifications that are facially neutral, for facially discriminatory policies are addressed by the BFOQ provision. The placement and context of the RFOA provision clearly supports reading the provision as a defense to facially neutral actions that violate ADEA § 4(a).

3. The RFOA Defense Does Not Operate as a Denial of An Intent to Discriminate.

A denial that an action was motivated by age responds to a claim that the employment action was motivated by age. A simple denial of discrimination is the appropriate response to a prima facie claim of intentional discrimination under the *McDonnell Douglas* model of proof. *See McDonnell Douglas*

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[25] *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

Corp. v. Green, 411 U.S. 792 (1973). Response by denial means that the plaintiff's evidence does not establish an action "otherwise prohibited" by § 4(a), since a prima facie case based on circumstantial evidence merely raises an inference of discrimination that does not shift the burden of proof to the employer. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

In contrast, the RFOA defense does not logically or structurally operate as a denial of intentional discrimination.[26] None of the language in ADEA § 4(f)(1), 29 U.S.C. §623(f)(1), suggests that the provision includes or responds to an element of intent to discriminate. Rather by asserting the RFOA, the employer admits that the action taken would otherwise constitute a violation of § 4(a) as the prefatory language of §4(f)(1) states. The employer seeks to justify the discrimination, however, by establishing the two elements of the RFOA provision, reasonableness and that the action was based on an age-neutral factor.

Not only does the language of ADEA § 4(f)(1) clearly preclude reading the provision as a mere denial to a claim of disparate treatment, but such a reading of the provision would render it superfluous. There would be no need for the statute to spell out a denial to a prima facie claim of disparate treatment. Such a construction violates the cardinal principle to give meaning to a provision that does not render it redundant or superfluous. *Kungys v. United States*, 485 U.S. 759, 778 (1988) ("No provision should be construed to be entirely redundant.")

When proof of intent to discriminate is part of a claim or its corresponding defense, Congress clearly includes language

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[26] *See* Mack A. Player, *Wards Cove Packing or Not Wards Cove Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act*, 31 U. RICH. L. REV. 819, 832-33 (1997).

imposing this requirement. Again, the OWBPA amendments to ADEA § 4(f)(2) are instructive. Prior to the OWBPA, the defenses for bona fide seniority systems and employee benefit plans in ADEA § 4(f)(2), contained the phrase "subterfuge to evade the purposes of this Act." 29 U.S.C. § 623(f)(2) (1989). In *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 203 (1977), the Court interpreted this phrase as requiring evidence of an intent to discriminate.[27] The OWBPA amendments removed the phrase "subterfuge to evade the purposes" from ADEA §4(f)(2).[28]

The ADEA's defense for employee benefit plans is now a clear, objective showing of increased cost, without any inquiry into the intent of the employer. 29 U.S.C. § 623(f)(2)(B)(i) (2000).[29] In contrast, Congress inserted the words "not intended to evade the purposes of this Act" into the bona fide seniority system defense in the OWBPA amendments to ADEA §4(f)(2)(A), 29 U.S.C. §623(f)(2)(A) (2000).

This deliberate exclusion of language requiring evidence of intent in subpart B of § 4(f)(2), and inclusion in subpart A, demonstrates that Congress acts purposefully to impose the elements of intent or compliance with the purposes of the Act in the ADEA's defenses. *See Russello v. United States*, 464 U.S. 16, 23 (1983) *(quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)) ("[W]here Congress includes particular language in one section of a statute but omits it in

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[27] Congress overturned the *McMann* decision in the 1978 amendments to the ADEA, Pub. L. No. 95-256, § 2(a), 92. Stat 189, and expressly disagreed with the "holding and reasoning" of the case. H.R. Conf. Rep. No. 95-950, at 8 (1978).

[28] S. Rep. No. 101-263, at 18 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 337 (1990); H.R. Rep. No. 101-664, at 34 (1990), *reprinted in* 1 OWBPA LEG. HIST., at 241 (1990).

[29] *Id.*

another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") The absence of language in ADEA Section 4(f)(1) of an intent requirement or an element related to the purposes of the ADEA strongly suggests that Congress drafted the provision to avoid any inquiry into these elements in establishing the RFOA defense.

B. This Court's Analysis of the Equal Pay Act Supports A Claim of Disparate Impact Under the ADEA.

The second major flaw in many of the lower court decisions is their reliance on the Equal Pay Act's defense for "any other factor other than sex," 29 U.S.C. § 206(d)(1) (2000), as support for rejecting disparate impact in ADEA cases. NELA submits that the EPA defense actually support the opposite conclusion — that the "factor other than" language responds to a claim of disparate impact.

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 204 & 209 (1974), the Court explicitly recognized that the EPA's "any other factor other than sex" provision would be an appropriate defense to a facially neutral practice or policy such as a pay differential for night shift work. In the EPA context, the "factor other than" means that the factor is not sex-based. The identical "factor other than" language in the RFOA defense should be similarly construed to apply to factors that are not age-based. *See, e.g., Northcross v. Memphis Board of Education*, 412 U.S. 427, 428 (1973).

The structure of the EPA's defense incorporated into Title VII further supports a plausible interpretation that the ADEA's recognizes disparate impact claims.[30] In *County of Washington*

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[30] Mack A. Player, *Wards Cove Packing or Not Wards Cove*

(continued...)

v. Gunther, 452 U.S. 161, 170 (1981), the Court reiterated that Title VII applies to sex-neutral systems that have an adverse impact on sex and not to just sex-motivated decisions.[31] In holding that the EPA "factor other than sex" defense was incorporated into Title VII, the Court acknowledged that the defense could apply to claims under Title VII that sex-neutral compensation systems were discriminatory.[32]

The Court's analysis in *Gunther* provides meaning to a statutory defense by reading it in context with the prohibitions to which it applies. Similarly, interpreting the RFOA provision to respond to claims that age-neutral policies violate ADEA Section 4(a) if they have a disparate impact on age, gives meaning to the phrase "factors other than age" in ADEA Section 4(f)(1).

The language "factor other than" does not make the defense implicit in or subsumed by the general prohibitions of the statute. This Court explicitly rejected the argument that the "any other factor other than sex" defense of the Equal Pay Act,[33] was implicit in Title VII's general prohibitions of discrimination "because of sex." *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981). *Gunther* reasoned that construing the "factor other than" defense as implicit in the Act's prohibitions would make it superfluous.

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[30](...continued)
Packing? That is Not the Question: Some Thoughts on Impact Analysis Under the Age Discrimination in Employment Act," 31 U. RICH. L. REV.819, 833-35 (1997).

[31] *Id.*

[32] *Id.*

[33] 29 U.S.C. § 206(d)(1) (2000).

The lower courts relying on *Gunther* to reject disparate impact claims under the ADEA further err in reading *Gunther* as holding that the "any other factor other than sex" defense under the EPA, 29 U.S.C. § 206(d)(1), precludes disparate impact claims for sex-based wage discrimination. [34] They use this purported holding of *Gunther* to conclude that similar language in the ADEA precludes disparate impact claims for age discrimination.[35]

To reach this conclusion, these courts first ignore the very clear and contrary reasoning in *Corning Glass Works v. Brennan*, 417 U.S. 188, 204-05, & 209 (1974), applying the "factor other than sex" defense to a facially neutral policy. Second, a close examination of *Gunther* yields no such holding at all. Third, their conclusion reveals a fundamental misunderstanding of the EPA and a significant difference between the EPA, Title VII, and the ADEA — no proof of intent or impact is needed to show a violation of the EPA.

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), the Court held that a prima facie violation of the EPA is established by an objective standard of unequal pay for equal work. The circuit courts have recognized the EPA as a form of "strict liability" statute under which the employer has the burden to prove one of the EPA's affirmative defenses once the plaintiff shows a pay disparity.[36] No proof of discriminatory

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[34] *Id.*

[35] *Id.*

[36] *See Miranda v. B&B Cash Grocery Store*, 975 F.2d 1518, 1533 (11th Cir. 1992). *See also Patkus v. Sangamon-Cass Consortium*, 769 F.2d 1251, 1260 n. 5 (7th Cir. 1985); *Strecker v. Grand Forks County Social Servs. Bd.*, 640 F.2d 96, 99 n.1 (8th Cir. 1980).

intent is needed to show a pay disparity in violation of the Equal Pay Act.[37]

While there are similarities in the ADEA's RFOA defense and the EPA's factor other than sex defense, there is also a critical difference. The language of ADEA § 4(f)(1) expressly requires the employer to show that the factor other than age is "reasonable," as discussed below.

C. The Term "Reasonable Factor" in ADEA Section 4(f)(1) Requires The Employer to Show That the Age-Neutral Factor is Job-Related.

The language of ADEA Section 4(f)(1), 29 U.S.C. §623(f)(1), requires that the "factors other than age" must be "reasonable." Neither the statute nor its legislative history provide a definition of the term "reasonable."[38] The term "reasonable" must be given effect, however. *See United States v. Menasche*, 348 U.S. 528, 539-40 (1955) (court's duty to give effect to every clause and word of a statute "rather than to emasculate an entire section.") It cannot be ignored as the courts rejecting disparate impact theory under the ADEA have done.[39]

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[37] *Id. See also* Nina Joan Kimball, *Not Just Any 'Factor Other Than Sex': An Analysis of the Fourth Affirmative Defense of the Equal Pay Act*, 52 GEO. WASH. L. REV. 318, 319 n. 10 (1984).

[38] *See* EGLIT, AGE DISCRIMINATION, § 5.16 at 5-64-67 (2d ed. 1995).

[39] *See Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001); *Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *Ellis v. United Air Lines Inc.*, 73 F.3d 999 (10th Cir. 1996); *EEOC v. Frances W. Parker School*, 41 F.3d 1073 (7th Cir. 1994).

Black's defines "reasonable" as "fair, proper, just, moderate, or suitable under the circumstances." BLACK'S LAW DICTIONARY1138 (5th ed. 1979). This simple definition of reasonable makes the RFOA defense different in type and degree from the employer's response of a legitimate, nondiscriminatory reason to a claim of disparate treatment. "Legitimate" is defined as "lawful" or "real, valid or genuine." BLACK'S LAW DICTIONARY 811 (5th ed. 1979). Applying the Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 611 (1993), legitimate in this context simply means not prohibited by the ADEA. Thus, an employer can rely on an unreasonable or illegal reason as a response to a disparate treatment claim, as long as the reason is "wholly motivated by factors other than age." *Id.*

A legitimate reason is not the same as a reasonable factor, given the Court's analysis in *Hazen Paper*. For example, an employer's response to an ADEA disparate treatment claim could be a reason such as race or pension vesting that is unlawful under another statute, but is not unlawful under the ADEA. *Id.* Such a response would not be reasonable because it would subject the employer to liability for other claims.

The reasonableness requirement of the RFOA provision also makes the defense inappropriate as a response to a disparate treatment claim because the disparate treatment theory does not permit inquiry into the "reasonableness," fairness, justness, or propriety of the employer's actions. *See Adreani v. First Colonial Bankshares Corp.*, 154 F.3d 389, 398 (7th Cir. 1998). Under the disparate treatment method of proof, the employer's actions may be unreasonable or unfair or arbitrary, yet not intentionally discriminatory. *See also* L. STEVEN PLATT & CATHY VENTRELL-MONSEES, AGE DISCRIMINATION LITIGATION, § 14.180 (2000).

A "reasonable factor" clearly connotes something more and different than a legitimate factor. The context of the RFOA

suggests that the term "reasonable" imposes a requirement that the factor be related to an individual's ability to do the job.[40/]

The meaning of "reasonable factor" as job-related is reflected by its juxtaposition to the BFOQ defense. Immediately preceding the language "reasonable factors other than age," Congress used the term "*reasonably* necessary" to describe the relationship between a "bona fide occupational qualification" and the "normal operation of the particular business." 29 U.S.C. §623(f)(1). The BFOQ defense focuses on the employee's ability to do the job. *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991). By following the BFOQ defense, a plausible reading of the term "reasonable factors" would be factors related to the job requirements or job performance given the context of the term within the statute.

The degree of reasonableness would depend on the circumstances of the case. In the BFOQ context, reasonably necessary means the employer is compelled to use age as a proxy for the job-related qualifications. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985). Similarly, Title VII requires that the particular employment practice causing a disparate impact must be job related and "consistent with business necessity." 42 U.S.C. § 2000e-2(k)(1)(A)(i).[41/] The Court has described the employer's response to a disparate impact claim under Title VII as a "*reasonable* measure of job performance." *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971).

[40/] *See* Player, *supra*, note 26, at 840-41.

[41/] The Civil Rights Act of 1991, Pub. L. No. 102-166, § 105, 105 Stat. 1071 (1991), added a provision to Title VII, § 703(k)(1)(A)(i), 42 U.S.C. § 2000e-2(k)(1)(A)(i), codifying the job related and business necessity concepts first set forth in *Griggs v. Duke Power*, 401 U.S. 424, 436 (1971).

The absence of the term "necessary" in the RFOA defense implies that the employer is not compelled to use the factors it chose. However, because the employer bears the burden of proving the RFOA defense, allowing any rationale would not justify excusing the violation of § 4(a). Rather, the language and context of the defense suggest an intermediate burden on the employer to demonstrate the reasonableness of its action. The business necessity standard of *Griggs* would be consistent with the RFOA. Proof by the employer of a substantial business purpose for using the factor could establish that the decision was "fair, proper, just, moderate, [or] suitable under the circumstances." BLACK'S, at 1138 (5th ed. 1979).

III. REGULATIONS CONTEMPORANEOUS WITH PASSAGE OF THE ADEA RECOGNIZE THE STATUTE PROHIBITS AGE-NEUTRAL PRACTICES THAT ADVERSELY AFFECT OLDER WORKERS, UNLESS JUSTIFIED AS JOB-RELATED UNDER THE SECTION 4(f)(1) DEFENSE.

Just nine days after the ADEA became effective, the Department of Labor[42/] issued interpretive regulations of the new statute.[43/] Significantly, the ADEA's first regulations were drafted under the leadership of Secretary Wirtz, whose 1965 report to Congress provided the historical documentation for federal legislation prohibiting age discrimination. REPORT OF

[42/] The ADEA as enacted, gave the Secretary of Labor the authority to issue rules or regulations necessary to carry out the statute. 29 U.S.C. § 628 (1968). Enforcement authority over the ADEA was transferred to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 3 C.F.R. part 321 (1978), *reprinted in* 5 U.S.C. app. § 1155 (1982).

[43/] 33 Fed. Reg. 9172 (June 21, 1968), codified at 29 C.F.R. §§ 860. 103-04 (1970). *See* Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AMER. UNIV. L. REV. 1071, 1104 (1998).

THE SECRETARY OF LABOR TO THE CONGRESS UNDER SECTION 715 OF THE CIVIL RIGHTS ACT OF 1964, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT, at 8 (JUNE 1965), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 16-41 (1965) (Hereinafter cited as the "WIRTZ REPORT "). Secretary Wirtz also led the Johnson Administration's efforts to introduce and pass legislation prohibiting age discrimination in employment. 113 Cong. Rec. 1377 (1967), *reprinted in* LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT, at 62-63, 68-69 (1965).

The 1968 DOL regulations interpreting ADEA Sections 4(a) and 4(f)(1) are entirely consistent with the statute and its legislative history. Indeed, there are remarkable parallels between the Wirtz Report's findings and recommendations, the statute's prohibitions and defenses, and the 1968 regulations.[44/]

The Wirtz Report found that explicit age limits precluding the hiring of workers above a certain age were the most common and obvious form of age discrimination. WIRTZ REPORT at 6. The Report also identified the existence of several "institutional arrangements that indirectly restrict[ed] the employment of older workers." WIRTZ REPORT at 15. The Report in effect recognized the different forms in which age discrimination appeared: facially discriminatory practices and facially neutral practices.

Specifically, the Report examined the following "institutional arrangements" that operated to restrict the employment of older persons: (1) "arbitrary rules which ignore individual differences," (2) "[p]romotion-from-within-policies," (3) seniority systems, (4) workers' compensation

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[44/] *See* Fentonmiller, *supra*, n. 43, at 1099-1107 (in depth examination of Wirtz Report, development of ADEA's prohibitions and defenses, and 1968 DOL Regulations.)

laws, and (5) private pension, health, and insurance plans. WIRTZ REPORT at 15-17.

In the findings, prohibitions, and defenses in the ADEA, Congress clearly concurred with the findings in the Wirtz Report. Congress' findings, which preface the purposes of the ADEA, parallel the Report's identification of both facially discriminatory and facially neutral practices as the causes of age discrimination:

> the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and *certain otherwise desirable practices may work to the disadvantage of older persons.*

29 U.S.C. § 621(a)(2) (1968) (emphasis added). The latter finding reflected Congress' concern that neutral practices unintentionally discriminated against older workers.

The broad language of the ADEA § 4(a) addresses the findings of the Wirtz Report and Congress by prohibiting not only intentional discrimination, but discrimination that may "adversely affect"[45/] an employee's status as well. *See* 29 U.S.C. § 623(a)(2).

The defenses crafted by Congress align with the types of discrimination and most[46/] of the institutional arrangements

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[45/] The Court has repeatedly cited the identical language in Title VII §703(a)(2), 42 U.S.C. §2000e-2(a)(2) as the source of the disparate impact method of proof. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *General Electric Co. v. Gilbert*, 429 U.S. 137 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971).

[46/] The ADEA does not explicitly deal with the issue of workers' compensation laws which the Wirtz Report mentions as one problematic area. *See* Fentonmiller, *supra*, note 43 at 1102.

detailed in the Wirtz Report.[47] The two original defenses in ADEA § 4(f)(1) correspond to explicit age limits and the first two institutional arrangements identified in the Wirtz Report. Explicit age limits would be unlawful except in narrow circumstances defined by the bona fide occupational defense. 29 U.S.C. §623(f)(1). *See Western Air Lines, Inc. v. Criswell*, 472 U.S. 400 (1985). "Arbitrary rules which ignore[d] individual differences" and "[p]romotion-from-within-policies," WIRTZ REPORT at 15, would be addressed by the second defense in § 4(f)(1), reasonable factors other than age. *See* 29 U.S.C. §623(f)(1).

The two defenses in ADEA § 4(f)(2) address the last two institutional arrangements discussed in the Wirtz Report. To deal with seniority systems and employee benefit plans, Congress designed the defenses in ADEA Section 4(f)(2) to permit certain age discrimination in seniority systems and employee benefit plans only if the systems and plans were bona fide and "not subterfuge[s] to evade the purposes of the Act."[48]

The 1968 DOL regulations reconfirmed that the ADEA and the Wirtz Report covered age-neutral, as well as explicitly age-based policies. The regulations continued the parallelisms between the problems of facially discriminatory and facially

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[47] *Id. See also* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLORIDA L. REV. 229, 295-96 (1990). The specific defenses designed by Congress to correspond to the institutional arrangements detailed in the Wirtz Report negate the argument that Congress chose to deal with facially neutral practices that disadvantaged older workers through "programmatic measure"only, and not through the statute's prohibitions. *See Ellis v. United Air Lines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996).

[48] In 1990, Congress eliminated this latter phrase. Older Workers Benefit Protection Act of 1990, Pub. L. No. 101-433, § 103(1) (1990), codified at 29 U.S.C. § 623(f)(2)(B)(i) (2000).

neutral arrangements, and the statutory defenses designed to address these problems. *Compare* 29 C.F.R. § 860.102 (BFOQ) with 29 C.F.R. §§ 860.103-04 (RFOA).

The 1968 DOL regulations expressly recognized that the "reasonable factor other than age" provision established an affirmative defense to claims that age-neutral practices and policies discriminated based on age. *See* 29 U.S.C. §§860.103-04 (1970). The regulations specifically identified the very types of facially neutral practices that have been commonly challenged under the disparate impact method of proof, such as employee tests,[49] physical fitness standards,[50] quantity or quality of production and educational requirements.[51] The regulations emphasized that the "reasonableness" of any factor is to be examined on case-by-case basis, "not on the basis of any general or class concept." 29 C.F.R. § 860.103(d).

Most importantly, the regulations clearly set forth a job-related standard in determining the reasonableness of the factors other than age upon which the employer acted. For example, the regulations explained that "validated employee tests" could fall within the RFOA defense if they were shown to be related to the requirements of the job, were "fair" and "reasonable" and administered in good faith. 29 C.F.R. § 860.104. Similarly, physical fitness standards must be "reasonably necessary for the specific work to be performed," and must be "uniformly and equally applied to all applicants for

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[49] Employee tests were the first facially neutral practice subjected to disparate impact analysis by the Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[50] *See, e.g., Lanning v. Southeastern Penn. Transp. Authority*, 181 F.3d 478 (3rd Cir. 1999) (physical fitness standards).

[51] Evaluation factors must be "shown to have a valid relationship to job requirements" and must be "applied uniformly to all employees, regardless of age." 29 C.F.R.. § 860.103 (f)(2) (1970).

the particular job category, regardless of age." 29 C.F.R.§103(f)(1)(i) (1970). The regulations' requirements are remarkably similar and prescient to the elements of the employer's defense to disparate impact claims set forth in *Griggs v. Duke Power.*

The 1968 DOL regulations should be given considerable weight in interpreting the ADEA given their issuance so close in time to the implementation of the statute. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Further, the regulations are entitled to special deference as the product of the same Secretary and administration that drafted the legislation that became the ADEA, and the same administration that authored the Wirtz Report, which documented the problems of age discrimination in both facially discriminatory and facially neutral practices. *See, e.g., Zubar v. Allen*, 396 U.S. 168, 192 (1969) (departmental interpretation of a statute carries the most weight when specifically interpreted by administrators who participated in its drafting.)

CONCLUSION

For the foregoing reasons, *amicus curiae* NELA urges the Court to reverse the judgment below and to hold that the ADEA permits disparate impact claims with ADEA § 4(f)(1) providing an affirmative defense to such claims.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 24 2002
CLERK

(7)

No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF AMICUS CURIAE OF THE CORNELL UNIVERSITY CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS AND THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONERS

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January 24, 2002

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. Disparate Treatment And Disparate Impact Are Not Separate Forms Of Discrimination 3

A. The Prima Facie Case Of Disparate Treatment And The Defense 4

1. The Term "Prima Facie Case" Has Two Meanings: The Elements Of A Claim And The Evidence That Proves The Elements Of A Claim 4

2. *McDonnell Douglas v. Green* Identifies A Prima Facie Case In The Second Sense 5

3. Disparate Treatment Has Six Elements, One Of Which Is Intent 6

4. The Bona Fide Occupational Qualification Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Treatment 10

B. The Prima Facie Case Of Disparate Impact And The Defense ..... .11

1. The Elements Of Disparate Impact Are Identical To The Elements of Disparate Treatment Except For Intent 12

2. The Business Necessity Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Impact 16

C. The Behaviors That Constitute Disparate Impact And Disparate Treatment Are The Same 17

II. Section 4(f)(1) Of The Age Act, Which Protects Use Of "Reasonable Factors Other Than Age," Does Not Authorize Employers To Use Employment Practices That Are Not Job Related And Have An Adverse Effect On Older Workers 21

A. The RFOTA Clause Does Not Protect Employment Practices With A Disparate Impact Because Such Practices Are Arbitrary, Not Reasonable. 21

B. Congress Did Not Intend The RFOTA Clause To Protect Employment Practices With A Disparate Impact Because Congress Was Not Aware Of Disparate Impact When The Age Act Was Passed. 22

C. The Legislative History Of The RFOTA Clause Reveals That It Was Not Intended To Bar Disparate Impact, But Instead Was Meant To Protect Employment Practices That Are Fair And Reasonable. 24

III. Employment Practices That Have A Disparate Impact Fall Squarely Within the Purposes Of The Age Act Because They Are The Sort Of Evil That Congress Meant To Eradicate. 26

CONCLUSION 28

TABLE OF AUTHORITIES

Cases

Connecticut v. Teal,
457 U.S. 440 (1982) 13

Dothard v. Rawlinson, 433 U.S. 321 (1977)
re. BFOQ 10-11
re. disparate impact 12-16

Gregory v. Litton Sys., Inc., 316 F.Supp. 401
(C.D. Cal. 1970), *aff'd as modified*,
472 F.2d 631 (9th Cir. 1972) 24

Griggs v. Duke Power Co.,
401 U.S. 424 (1971) 2, 24

Hicks v. Crown Zellerbach Corp., 319 F.Supp.
314 (E.D. La. 1970) 24

International Union, United Auto Workers v. Johnson Controls, 499 U.S. 187 (1991) 11

Johnson v. Transportation Agency,
480 U.S. 616 (1987) 6

McDonnell Douglas v. Green,
411 U.S. 792 (1973) 5-6

Meith v. Dothard,
418 F.Supp. 1169 (M.D. Ala. 1976) 13

Trans World Airlines v. Thurston,
469 U.S. 111 (1985) 7-9

Statutes

Age Discrimination in Employment Act
29 U.S.C. §§621 et seq.
§2(b), 29 U.S.C. §621(b) 2-3, 27
(purposes)
§4(f)(1), 29 U.S.C. §623(f)(1) 10-11
(BFOQ clause)
§4(f)(1), 29 U.S.C. §632(f)(1) 2, 21-22, 24-26
(RFOTA clause)

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e et seq.
§703(e), 42 U.S.C. §2000e-2(e) 10-11
(BFOQ clause)
§703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A) . 16-17
(burden of proof in disparate impact)

Congressional Materials

113 CONGRESSIONAL RECORD 31,252 (1967) 24

113 CONGRESSIONAL RECORD 31,253 (1967) 25

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Prosser, William L., HANDBOOK OF THE LAW OF TORTS (3d ed. 1964) 5

INTEREST OF THE AMICI CURIAE[1]

The Cornell University chapter of the American Association of University Professors seeks to advance academic freedom, to define fundamental professional values and standards for higher education, and to ensure higher education's contribution to the common good. Membership is open to all faculty, librarians, and academic professionals employed by Cornell University. The chapter is particularly concerned with issues of age discrimination. Most members of the chapter are over the age of forty. Librarians and academic professionals do not enjoy tenure, and increasing numbers of teaching and research positions are being taken off the tenure track. All persons in these positions can be discharged at will and are subject to the discriminatory effects of non-job-related criteria. Even tenured professors are not fully protected from disparate impact discrimination.

The National Lawyers Guild was founded in 1937 as the first integrated national organization of lawyers in the United States. Based on the premise that the law should be used for social amelioration, the Guild currently consists of approximately 6,000 lawyers, legal workers and law students. Individually and on specific shared projects, members work nationally on a wide range of legal concerns. Labor and employment issues have been a central focus of the Guild's mission during its nearly seventy-year history, and its Labor and Employment Committee monitors working conditions in this country and internationally.

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[1]The parties' written consent to the filing of briefs amicus curiae has been filed with the Clerk of this Court. Amici state that this brief was not authored in whole or in part by counsel for any party and that no party or entity, other than Amici and their counsel, has made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Contrary to widespread belief, disparate treatment and disparate impact are not separate forms of discrimination. Except for the element of intent, the prima facie case of disparate treatment cannot be distinguished from the prima facie case of disparate impact. In both, the defendant arbitrarily affords a lesser chance to the plaintiff than to the plaintiff's comparator to benefit from an employment opportunity. The defenses to disparate treatment and disparate impact are also indistinguishable. Both when age or sex is a bona fide occupational qualification, and when an employment practice is a business necessity, the plaintiff is not qualified for the opportunity.

Congress was not aware of disparate impact when the civil rights laws of the 1960s were enacted. The realization that employment practices could be "fair in form, but discriminatory in operation"[2] did not enter the public consciousness until this Court's decision in *Griggs v. Duke Power Co.*

Section 4(f)(1) of the Age Discrimination in Employment Act authorizes practices based on "reasonable factors other than age."[3] Contrary to advocates' contentions, this section does not prove that Congress intended to protect employment practices that serve no legitimate goal of the business and disadvantage older workers. Rather, this section reveals that Congress intended to protect practices that are reasonable and fair.

The purposes of the Age Act should be used to determine how to interpret the act. Those purposes are to prohibit "arbitrary age discrimination in employment" and "to promote

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[2] *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

[3] 29 U.S.C. §632(f)(1).

employment of older persons based on their ability rather than age."[4] A practice that is not job related serves no legitimate goal of the business. If, in addition, the practice disadvantages older workers, it does only one thing: it arbitrarily selects on the basis of age, not ability. For these reasons, eliminating practices with a disparate impact on older workers falls within the purposes of the Age Act.

ARGUMENT

I
Disparate Impact And Disparate Treatment Are Not Separate Forms Of Discrimination.

Although it is widely believed that disparate treatment and disparate impact are separate forms of discrimination, in truth they are not.[5] Properly understood, disparate treatment and disparate impact comprise identical behaviors, with the exception of scienter. A defendant's act of disparate treatment is the same as a defendant's act of disparate impact; the only difference between them is that the defendant intends to commit disparate treatment, but does not intend to commit disparate impact.

The legal vocabulary would be clarified if we referred, not to disparate treatment and disparate impact, but to intentional and

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[4] 29 U.S.C. §621(b).

[5] For a full discussion of the almost total overlap of disparate treatment and disparate impact, *see* Michael Evan Gold, *Towards a Unified Theory of the Law of Employment Discrimination*, 22 BERKELEY JOURNAL OF EMPLOYMENT AND LABOR LAW 175 (2001).

unintentional discrimination. This change would make clear that *there is only one kind of discrimination*; sometimes it is intentional, and sometimes it is not. In deference to prevailing usage, however, we will use the conventional terms in this brief.

A
The Prima Facie Case Of Disparate Treatment And The Defense

Except for the base (age, race, sex, etc.), disparate treatment under the Age Discrimination in Employment Act[6] is the same as disparate treatment under Title VII of the Civil Rights Act of 1964.[7] Accordingly, we may study either statute to learn about the nature of disparate treatment.[8] But first a few words about procedure are necessary.

1
The Term "Prima Facie Case" Has Two Meanings: The Elements Of A Claim And The Evidence That Proves The Elements Of A Claim.

The term "prima facie case" is used in two senses. It can mean the *elements* or the *material facts* of a claim; for example, the elements of battery are a harmful or offensive physical

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[6]Pub. L. 90-202, 81 Stat. 602, 29 U.S.C. §§621 et seq.

[7]Pub. L. 88-352, 78 Stat. 241, 253, 42 U.S.C. §§2000e et seq.

[8]*See* Barbara Lindemann & Paul Grossman, EMPLOYMENT DISCRIMINATION LAW 586 (3d ed. 1996).

contact that is intentional.[9] This may be called the prima facie case in the first sense. "Prima facie case" can also mean the *evidentiary facts that prove* the elements of a claim; for example, a prima facie battery may be proved by the plaintiff's testimony that he was punched in the nose by the defendant, who had just said, "I hate you." This may be called the prima facie case in the second sense. Only one prima facie case in the first sense exists for each claim; in contrast, as many prima facie cases in the second sense exist as cases that come to court.

2
McDonnell Douglas v. Green Identifies A Prima Facie Case In The Second Sense.

This Court has never specified the elements of the claim of disparate treatment (the prima facie case in the first sense), but has provided in *McDonnell Douglas v. Green*[10] a convenient and widely applicable "formula" for proving disparate treatment.[11] It has always been clear that the *McDonnell*

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[9]*See* William L. Prosser, HANDBOOK OF THE LAW OF TORTS §9 (3d ed. 1964).

[10]411 U.S. 792 (1973).

[11]A complainant must

> "show[] (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of

(continued...)

Douglas formula does not state the material facts of the claim itself. For example, the formula requires the plaintiff to prove that *he* belongs to a *racial minority*, yet Title VII protects women as well as men, and prohibits sex as well as race discrimination.[12] Thus, the *McDonnell Douglas* formula is a prima facie case in the second sense.

3
Disparate Treatment Has Six Elements, One Of Which Is Intent.

Although this Court has not specified the elements of disparate treatment, they can be inferred from a study of cases in this Court. When the defendant is an employer, the elements of disparate treatment are

1. The employer is covered by the act.
2. The employer offered an employment opportunity.
3. The plaintiff is protected by the act, i.e.,
   a. the plaintiff belongs to a group that is protected by the act;
   b. the plaintiff was qualified for the opportunity;

[11](...continued)
complainant's qualifications.[13]

"[13] The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."

411 U.S. at 802.

[12] *Johnson v. Transportation Agency*, 480 U.S. 616 (1987).

   c. the plaintiff was willing to accept the opportunity.
4. The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the opportunity.
5. The cause of the plaintiff's lesser chance was membership in the protected group.
6. The employer intended to give individuals of the plaintiff's group a lesser chance to benefit from the opportunity.

Trans World Airlines v. Thurston[13] provides a good example of disparate treatment. A federal regulation prohibited persons aged sixty and older from serving as captain or co-captain on commercial flights; no similar regulation applied to flight engineers. TWA allowed captains and co-captains under sixty to bid for transfer to the job of flight engineer, but did not allow captains and co-captains over sixty to bid for transfer. This Court affirmed a judgment that TWA had committed disparate treatment.

[13] 469 U.S. 111 (1985).

ELEMENTS (MATERIAL FACTS) OF DISPARATE TREATMENT (PRIMA FACIE CASE IN THE FIRST SENSE)		PROOF (EVIDENTIARY FACTS) IN *TWA v. THURSTON* (PRIMA FACIE CASE IN THE SECOND SENSE)	
1.	The employer is covered by the act.	1.	TWA conceded it was covered by the act.
2.	The employer offered an employment opportunity.	2.	TWA allowed captains and co-captains to bid for transfer to the position of flight engineer.
3.	The plaintiff is protected by the act, i.e.,	3.	
a.	the plaintiff belongs to a group that is protected by the act;	a.	The plaintiff was sixty years old;
b.	the plaintiff was qualified for the opportunity;	b.	the plaintiff had been a captain and was qualified to serve as a flight engineer;
c.	the plaintiff was willing to accept the opportunity.	c.	the plaintiff wished to serve as a flight engineer.

4.	The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the employment opportunity.	4.	TWA allowed captains and co-captains under sixty, but not over sixty, to bid for transfer to flight engineer.
5.	The cause of the plaintiff's lesser chance was membership in the protected group.	5.	If the plaintiff had been under sixty, he would have been allowed to bid for transfer.
6.	The employer intended to give individuals of the plaintiff's group a lesser chance to benefit from the opportunity.	6.	TWA intentionally used age as the basis for denying the plaintiff the opportunity to bid for the position of flight engineer.

Causation is a crucial element of a claim for disparate treatment. Age, race, sex, etc. must be the reason the plaintiff lost an employment opportunity. When all members of the plaintiff's group are treated exactly the same (for example, no captain over sixty could bid for flight engineer), causation is obvious; but sometimes it is not. For example, suppose an employer believes that most older workers are less productive than younger workers and, accordingly, holds older applicants to a stricter standard than younger applicants. The employer's

notion is that only older workers who satisfy the stricter standard are as productive as younger workers who satisfy the normal standard. The plaintiff, an older worker, meets the normal standard, but not the stricter one, and is rejected. It might seem that age is not the cause of the plaintiff's rejection; after all, some older applicants are hired. Yet the employer denies older workers the opportunity to be judged by the same standard by which younger workers are judged. Thus, the employer intentionally affords each older worker a lesser chance than younger workers to get the job, and thereby commits disparate treatment.

4
The Bona Fide Occupational Qualification Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks the Prima Facie Case Of Disparate Treatment.

The defense to disparate treatment is the bona fide occupational qualification (BFOQ). An employer may award employment opportunities on the basis of age, religion, sex, or national origin if the characteristic is "reasonably necessary to the normal operation of that particular business."[14] In application, a characteristic is a BFOQ if all or substantially all members of the excluded class are unable to perform an essential task of the job and individual testing is not feasible.[15] Thus, this Court held in *Dothard v. Rawlinson* that being male was a BFOQ for the job of guard in maximum-security prisons

[14] Age Act §4(f)(1), 29 U.S.C. §623(f)(1); Title VII §703(e), 42 U.S.C. §2000e-2(e).

[15] *See* Lindemann & Grossman, *supra* n. 8, at 395 ff.

in Alabama because of the risk that a woman would be sexually assaulted by the inmates.[16]

Procedurally, the BFOQ is a defense because the burden of persuasion rests on the defendant.[17] Substantively, however, the BFOQ destroys an element of the plaintiff's prima facie case. Being qualified for the opportunity is an element of the prima facie case. If all persons of the plaintiff's age, religion, sex, or national origin are unable to perform an essential task of the job, the plaintiff is simply not qualified for the job. No woman was qualified to be a guard in the maximum-security prisons of Alabama because every woman faced the risk of sexual assault.

B
The Prima Facie Case Of Disparate Impact And The Defense

The prima facie case of disparate impact is identical to the prima facie case of disparate treatment, minus the element of intent. Also, the defense to disparate impact (business necessity) is identical to the defense to disparate treatment (the BFOQ) because both challenge the plaintiff's qualifications for the opportunity in question.

[16] 433 U.S. 321, 332 ff. (1977).

[17] *Dothard v. Rawlinson*, 433 U.S. 321, 334 ("the District Court erred in rejecting the [defendant's] contention that Regulation 204 [excluding women from certain jobs] falls within the narrow ambit of the BFOQ exception"); *International Union, United Automobile Workers v. Johnson Controls*, 499 U.S. 187, 206 (1991) ("We have no difficulty concluding that Johnson Controls cannot establish a BFOQ").

1
The Elements Of Disparate Impact Are Identical To The Elements Of Disparate Treatment Except For Intent.

This Court has not specified the elements of disparate impact, but the elements can also be inferred from a study of cases in this Court. When the defendant is an employer, the elements of disparate impact are

1. The employer is covered by the act.
2. The employer offered an employment opportunity.
3. The plaintiff is protected by the act, i.e.,
   a. the plaintiff belongs to a group that is protected by the act;
   b. the plaintiff was qualified for the opportunity;
   c. the plaintiff was willing to accept the opportunity.
4. The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the opportunity.
5. The cause of the plaintiff's lesser chance was membership in the protected group.

These elements are identical to the elements of disparate treatment except that intent is absent.

From this point on, it will be helpful to distinguish two related terms. We will use the term "adverse effect" to refer to an employment practice that disadvantages a protected group in relation to its comparators, and the term "disparate impact" to refer to an employment practice that has an adverse effect and, in addition, is not job related.

Another aspect of *Dothard v. Rawlinson* provides a good

example of disparate impact. The Board of Corrections of the State of Alabama was hiring prison guards. The hiring process had two steps. Step one: applicants were eliminated if they did not stand a minimum of 5 feet 2 inches tall and weigh a minimum of 120 pounds.[18] Step two: applicants who met these minima were evaluated according to education and experience.[19] The minima had an adverse effect on women because 99 percent of men but only 51 percent of women were tall and heavy enough. Also, the minima were not job related because they did not distinguish between qualified and unqualified workers.

ELEMENTS (MATERIAL FACTS) OF DISPARATE IMPACT (PRIMA FACIE CASE IN THE FIRST SENSE)	PROOF (EVIDENTIARY FACTS) IN *DOTHARD v. RAWLINSON* (PRIMA FACIE CASE IN THE SECOND SENSE)
1. The employer is covered by the act.	1. The Board of Corrections conceded it was covered by the act.
2. The employer offered an employment opportunity.	2. The Board was evaluating applicants for prison guard on the basis of education and experience.

[18]Progressing through a selection process is an opportunity protected by Title VII. *Connecticut v. Teal*, 457 U.S. 440 (1982).

[19]*Meith v. Dothard*, 418 F.Supp. 1169, 1175 (M.D. Ala. 1976).

3.	The plaintiffs are protected by the act, i.e.,	3.	
a.	the plaintiffs belong to a group that is protected by the act;	a.	The plaintiffs were women;
b.	the plaintiffs were qualified for the opportunity;	b.	women were capable of being prison guards;
c.	the plaintiffs were willing to accept the opportunity.	c.	women were interested in becoming prison guards.
4.	The employer afforded members of the plaintiff's group a lesser chance than their comparators to benefit from the employment opportunity.	4.	The height and weight minima had an adverse effect on women because 99 percent of men but only 51 percent of women satisfied the minima.
5.	The cause of the plaintiffs' lesser chance was membership in the protected group.	5.	Because the height and weight minima were not job related, they served only to exclude women.

As in a disparate treatment case, causation is a crucial element in a disparate impact case; and yet it is not obvious how age, race, or sex, etc. is the cause of a disparate impact. After all, the majority of women met the height and weight minima, and some men did not. In what sense was Ms. Dothard's sex the *cause* of her not being allowed to progress to step two of the hiring process? The answer lies in the knowledge that the height and weight minima were not job related. There was no evidence that larger persons made better guards than smaller persons. As a result, the height and weight minima were arbitrary. They served no legitimate goal of the business; they were ineffective in selecting qualified candidates for the job. But the minima were not inert. What did they do? They did one thing and one thing only: *they distinguished men from women.* Assuming that equal numbers of men and women submitted applications, the minima ensured that approximately twice as many men would progress to step two.[20]

The effect of the minima on applicants was the same as though the employer had said, "There are many applicants for this job. I don't know which ones are qualified and which are not. I will evaluate the qualifications of 99 percent of the men but only 59 percent of the women." Thus, by using these minima as selection criteria, the employer arbitrarily gave each qualified man a 99 percent chance of progressing to step two of the hiring process, but each qualified woman only a 59 percent chance. As in a disparate treatment case, therefore, an employer in a disparate impact case affords each victim of discrimination a lesser chance to benefit from the employment opportunity.

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[20]One hundred men apply; 99 progress to step two. One hundred women apply; 59 progress to step two. Thus, (99 + 59 =) 158 persons progress to step two; (99 ÷ 158 =) .63 of them are men, and (59 ÷ 158 =) .37 are women.

2
The Business Necessity Defense Challenges The Plaintiff's Qualifications And, Therefore, Attacks The Prima Facie Case Of Disparate Impact.

Our understanding of disparate impact is reinforced by consideration of the defense of job relatedness. After the plaintiff proves that an employment practice has an adverse effect, the burden shifts to the employer "to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[21] If an employment practice is job related, it distinguishes between qualified and unqualified workers.[22] Accordingly, if the height and weight minima in *Dothard* had been job related—that is, if larger persons did in fact make better prison guards than smaller persons—the minima would have distinguished between qualified and unqualified persons. The minima would still have had an adverse effect on women, but the cause of the adverse effect would have been the genuine needs of the business, not sex. Proportionally fewer women would have progressed to step two because proportionally fewer women would have been qualified for the job.

In sum, proof that an employment practice is job related is actually proof that proportionally fewer members of the plaintiffs' group are qualified for the opportunity than are members of the comparators' group. Thus—again as in disparate treatment—job relatedness is procedurally a defense to disparate impact because the burden of proving job

[21]Title VII §703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A).

[22]*See* Lindemann & Grossman, *supra* n. 8, at 106 ff.

relatedness falls on the defendant;[23] but, substantively, job relatedness destroys an element of the prima facie case, namely, the plaintiffs' qualifications.

We have seen that the elements of disparate impact and disparate treatment (the prima facie cases in the first sense) are identical except for intent. Now it is evident that the defenses, which actually refute the plaintiffs' proof that they are qualified for the opportunities, are also identical.

C
The Behaviors That Constitute Disparate Impact And Disparate Treatment Are The Same.

The prima facie cases of disparate impact and disparate treatment are the same except that disparate impact omits intent. The defenses to disparate impact and disparate treatment are the same because they rebut the plaintiffs' proof of qualifications. It should follow that the behaviors that constitute disparate impact and disparate treatment are also the same, and they are.

When TWA decided that it would not employ anyone over the age of sixty for the job of flight engineer, the selection criterion was obviously age. A way to describe most (if not all) disparate treatment cases is that a protected characteristic (age, race, sex, etc.) is the selection criterion.

A protected characteristic is also the selection criterion in disparate impact cases. Suppose an airline has a rule that says no one with dentures may hold the job of flight engineer. Let us assume that the airline adopts the no-denture rule in good faith

[23]Title VII §703(k)(1)(A), 42 U.S.C. §2000e-2(k)(1)(A).

(believing, perhaps, that dentures might dislodge in high turbulence) and not as a subterfuge to exclude older workers. Let us also assume that 60 percent of persons aged sixty and above have dentures, as compared to 20 percent of younger persons. Finally, let us assume that no good evidence exists that dentures are prone to dislodge during turbulence. On these facts, the no-denture rule has an adverse effect on older workers and serves no legitimate interest of the employer. In fact, the rule *does only one thing*: it disadvantages older workers. It arbitrarily gives each of them a lesser chance to benefit from the employment opportunity. It is, in effect, exactly as though the employer had said, "Two hundred persons are qualified for the job, half under sixty and half over sixty. I will allow 80 of the younger ones and 40 of the older ones to bid for jobs as flight engineers." Thus—precisely as in disparate treatment—a protected characteristic is the selection criterion in disparate impact. In our hypothetical case, the selection criterion is age (in the form of the no-denture requirement), and it arbitrarily determines the chance each qualified person has to bid on the job of flight engineer. For no good reason, the no-denture rule gives each person under the age of sixty an 80 percent chance to bid, and each person over the age of sixty only a 40 percent chance to bid.

Three simple hypothetical cases will demonstrate the almost complete overlap of disparate impact and disparate treatment.

Case 1

1. An employer gives all applicants a written test.
2. Applicants must pass the test in order to qualify for an interview.
3. The test contains many questions about popular culture, such as music and films, of which younger persons are

more knowledgeable than older persons. In consequence, 80 percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.
4. The test does not predict success on the job.

Case 1 is a disparate impact case.

Case 2

1. Based on personal experience and anecdotes, an employer believes that younger workers are better suited for a job than older workers are.
2. The employer purposefully devises a written test that is unrelated to the job and favors younger workers. It is composed of questions about popular culture, such as music and films, of which younger persons are more knowledgeable than older persons.
3. Applicants must pass the test in order to qualify for an interview.
4. Eighty percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.

Case 2 is a disparate treatment case.

Case 3

1. An employer gives all applicants a written test.
2. Applicants must pass the test in order to qualify for an interview.
3. The test contains many questions about popular culture, such as music and films, of which younger persons are

more knowledgeable than older persons. In consequence, 80 percent of applicants under age forty pass the test, but only 40 percent of applicants over age forty pass.

4. The test does not predict success on the job.
5. At all times the employer has been aware of facts 1-4. That is, the employer knows the test has an adverse effect on older workers and is not job related.

Is Case 3 a disparate impact or a disparate treatment case? Facts 1-4 constitute a classic disparate impact case. Fact 5 establishes the employer's scienter. Does the leopard change into a lion? No. It is the same animal all along. In each hypothetical case, the employer's behavior serves no legitimate goal of the business, and arbitrarily disadvantages qualified plaintiffs relative to their comparators. The only difference among the cases is that in cases 2 and 3, the employer does it on purpose, whereas in case 1 the employer does it unintentionally.

Thus, close analysis demonstrates that the behaviors that constitute disparate impact and disparate treatment are indistinguishable. The Age Act and Title VII proscribe denying employment opportunities on the basis of age, race, sex, etc. Discrimination, whether called disparate impact (but more properly called unintentional discrimination) or disparate treatment (intentional discrimination), arbitrarily denies workers in protected classes the same opportunities that their comparators enjoy. Except for intent, there is only one kind of discrimination, and the only difference between disparate impact and disparate treatment is the defendant's state of mind.

It follows that the evil outlawed by disparate impact is substantially the same as the evil outlawed by disparate treatment.

II
Section 4(f)(1) Of The Age Act, Which Protects Use Of "Reasonable Factors Other Than Age," Does Not Authorize Employers To Use Employment Practices That Are Not Job Related And Have An Adverse Effect On Older Workers.

Section 4(f)(1) of the Age Act states that it is not unlawful for an employer

> "to take any action otherwise prohibited ... where the differentiation is based on reasonable factors other than age ...."[24]

Advocates in search of arguments assert the clause "reasonable factors other than age" (RFOTA) was intended to exclude disparate impact from the Age Act, in other words, that Congress intended to allow employers to maintain practices that are not job related and have an adverse effect on older workers. This argument is falsified by the text of the RFOTA clause, the legislative history of the Age Act in general, and the specific legislative history of the RFOTA clause.

A
The RFOTA Clause Does Not Protect Employment Practices With A Disparate Impact Because Such Practices Are Arbitrary, Not Reasonable.

The RFOTA clause specifically protects employment practices "based on *reasonable* factors other than age" (emphasis added). Practices with a disparate impact, however, are far from

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[24] 29 U.S.C. §623(f)(1).

reasonable. Instead, such practices are arbitrary because they serve no legitimate goal of the business and, without good reason, deprive older workers of employment opportunities. Thus, the text of the RFOTA clause defeats the argument that the clause was intended to protect employment practices that have a disparate impact on older workers.

B
Congress Did Not Intend The RFOTA Clause To Protect Employment Practices With A Disparate Impact Because Congress Was Not Aware Of Disparate Impact When The Age Act Was Passed.

Congress did not intend the RFOTA clause to exclude disparate impact from the Age Act because, in truth, Congress formed no intent regarding disparate impact. The reason is that Congress was not aware of disparate impact at the time the bill was enacted. The realization that disparate impact is a form of employment discrimination did not enter the public mind until the 1970s. Thus, Congress never addressed the question of whether to outlaw disparate impact, and the text of the act and its legislative history should not be contorted to answer to a question that was never asked.

Although proving a negative is difficult, it is not impossible; and in this case the historical record is clear. Congress did not understand disparate impact during the debates over Title VII in 1963 and 1964[25] or during consideration of the Age Act in 1967. A reader with no ax to grind will find no discussion of disparate impact in the Secretary of Labor's report to Congress

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[25]*See* Michael Evan Gold, *Griggs Folly*, 7 INDUSTRIAL RELATIONS LAW JOURNAL 429, 489 ff. (1985) (discussing the legislative history of Title VII).

on age discrimination,[26] the committee reports in the House of Representatives and the Senate,[27] or the floor debates on the Age Act. Our legislators neither condemned disparate impact nor condoned it because they did not know about it.

Almost no one else did either. The idea of disparate impact did not begin to enter public consciousness until the end of the 1960s. The idea was born in a controversy over intelligence tests, which came under attack earlier in the decade on the ground that they were culturally biased. The idea was that disadvantaged groups in society scored lower than others on intelligence tests, not because of lack of innate ability, but because of lesser educational opportunities and cultural segregation.

Today we readily see how this idea can be applied to employment tests. They, too, may be biased against disadvantaged groups: for tests that are not job related can favor whites over people of color, or younger workers over older workers, not because of ability, but because of varying educational opportunities and cultural factors. But this entirely correct application of an important idea had not occurred, at least not in public, in 1967. Rather, the first appearance of the application to employment tests was an article published in the Harvard Law Review in 1969.[28] The article was highly influential, but it could not have influenced a statute that was enacted two years before the article was published. For

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[26]THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT (1965).

[27]H. Rep. 805, 90th Cong., 1st Sess. (Oct. 23, 1967); S. Rep. 707, 90th Cong., 1st Sess. (Nov. 4, 1967).

[28]George Cooper and Richard Sobel, *Seniority and Testing Under Fair Employment Laws*, 82 HARVARD LAW REVIEW 1598 (1969).

practical purposes, the law-making community did not become aware of disparate impact until this Court's decision in *Griggs v. Duke Power Co.* in 1971.[29]

It follows that Congress neither accepted nor rejected disparate impact under the Age Act. Congress certainly understood arbitrary behavior, but did not realize that it included disparate impact.

C
The Legislative History Of The RFOTA Clause Reveals That It Was Not Intended To Bar Disparate Impact, But Instead Was Meant To Protect Employment Practices That Are Fair And Reasonable.

Senator Yarborough, the floor manager of the bill that became the Age Act[30] and, therefore, an authoritative source, illustrated the situation to which the RFOTA clause would apply:

> "For example, if a test shows that a man cannot do certain things. He might fail to pass the test at 35; he might fail to pass the test at 55. Some men slow up sooner than others. If the job requires a certain speed and the differentiation is based upon factors other than age, the law would not apply."[31]

[29] 401 U.S. 424 (1971). *Griggs* was anticipated by two cases, *Gregory v. Litton Sys., Inc.*, 316 F.Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972), and *Hicks v. Crown Zellerbach Corp.*, 319 F.Supp. 314 (E.D. La. 1970). Both were decided after the Age Act became law.

[30] 113 CONGRESSIONAL RECORD 31,252 (1967) (remarks of Sen. Yarborough).

This example is instructive, but only if it is interpreted in a balanced way.

It would be excessive to argue that the example proves that Congress intended the RFOTA clause to exclude disparate impact from the Age Act. A practice with a disparate impact is not job related. Accordingly, if Senator Yarborough had understood the RFOTA clause to protect such a practice (and thereby nullify disparate impact under the act), the practice in his example would not have been job related. But in fact the practice is job related. Indeed, the example captures the essence of the business necessity defense to disparate impact. In the example—

- An employer gives a test to a worker.
- The test is job related ("the job requires a certain speed").
- The worker fails the test ("a man cannot do certain things"; "some men slow up sooner than others").
- The employer has not violated the Age Act ("the law would not apply").

Far from demonstrating an intent to exclude disparate impact, Senator Yarborough's example seems to ratify disparate impact by providing the customary defense. But this argument is also excessive. The facts of the example do not suggest that the employer's test had an adverse effect on older workers. The man might fail the test at thirty-five or at fifty-five, and there is no suggestion that more older than younger workers fail the

[31] *Id.* at 31,253.

test.

A balanced reading of Senator Yarborough's example shows that the RFOTA clause was intended to protect employment practices that are reasonable and fair. A job requires a certain speed of production. Surely it is reasonable for an employer to test workers to determine whether they can produce at that speed. A man takes the test and fails. His failure is unfortunate, but it is fair. It is anything but arbitrary.

Senator Yarborough's example confirms what the text of the RFOTA clause and the general legislative history of the Age Act reveal. Congress was not aware of disparate impact in 1967. Congress meant the RFOTA clause to protect reasonable and fair employment practices. The clause was not intended to protect arbitrary practices.

III

Employment Practices That Have A Disparate Impact Fall Squarely Within the Purposes Of The Age Act Because They Are The Sort Of Evil That Congress Meant To Eradicate.

Liberty should not be restricted without good reason. A statute that does not prohibit certain conduct should not be interpreted to proscribe that conduct unless it clearly falls within the evil the statute was meant to eliminate. The question, therefore, is whether disparate impact falls within the evil at which the Age Act was aimed. The answer is yes.

That disparate impact and disparate treatment are indistinguishable except for intent stands as strong evidence that both address the same evil. If one serves the purposes of the Age Act, so does the other. Examination of the purposes stated in the act buttresses this conclusion.

Congress stated its purposes clearly. One of them is

> "...to prohibit arbitrary age discrimination in employment...."[32]

An employment practice that is not job related is arbitrary. Some arbitrary practices are not discriminatory, and the law may ignore them. An employer may refuse to hire anyone born under the sign of Virgo. But if an arbitrary practice is also discriminatory—if it favors younger workers over older workers, all of whom are willing and able to perform the work in question—the practice is an evil of the sort that Congress meant to eradicate.

Another purpose of the Age Act is

> "...to promote employment of older persons based on their ability rather than age...."[33]

A practice with a disparate impact on older workers selects, not on the basis of ability, but on the basis of age. This is directly contrary to the purpose of the Age Act.

Outlawing disparate impact would serve the purposes of the Age Act. It would ensure that older persons are indeed judged *on the basis of ability rather than age*.

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[32] 29 U.S.C. §621(b).

[33] *Id.*

CONCLUSION

Employment discrimination is like Janus: a creature with two faces but one body. Disparate impact and disparate treatment are similar in all ways except that the latter includes scienter. Although Congress was not aware of disparate impact in 1967, Congress clearly stated the evils it intended to eradicate. These evils include arbitrary behavior, which disparate impact incarnates. For these reasons, Amicus respectfully requests that this Court reverse the judgment of the Court of Appeals for the Eleventh Circuit and remand the case for further proceedings.

Respectfully submitted,

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Date: January 24, 2002

Supreme Court, U.S.
FILED
FEB 20 2002
OFFICE OF THE CLERK

(9)

No. 01-584

In the
Supreme Court of the United States

WANDA ADAMS, et al.,

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS

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31 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

IDENTITY AND INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. NEITHER CONGRESSIONAL INTENT NOR THIS COURT'S PRECEDENTS JUSTIFY DISPARATE IMPACT LIABILITY UNDER THE ADEA 3

A. This Court Has Suggested That the ADEA Encompasses Only Disparate Treatment 3

B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination 5

C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination 6

II. THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS 9

A. Administrative Agencies Have Expanded the Scope of Disparate Impact Analysis to Other Laws 9

B. Congress Has Limited Disparate Impact Liability 10

III. RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION 13

TABLE OF CONTENTS—Continued

Page

IV. SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA 16

A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations 16

B. Disparate Impact Raises the Specter of Quotas 17

C. Disparate Impact Is Particularly Subject to Abuse 18

1. *Cureton v. National Collegiate Athletic Association* 18

2. *Association of Mexican-American Educators v. California* 21

3. *African American Legal Defense Fund v. New York State Department of Education* 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page

Cases

Adams v. Florida Power Corporation, 255 F.3d 1322 (11th Cir. 2001) 2

African American Legal Defense Fund, Inc. v. New York State Department of Education, 8 F. Supp. 2d 330 (S.D. N.Y. 1998) 22-24

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 7

Alexander v. Sandoval, 532 U.S. 275 (2001) 10, 21

Association of Mexican-American Educators v. California, 231 F.3d 572 (9th Cir. 2000) 21-24

Connecticut v. Teal, 457 U.S. 440 (1982) 8

Cureton v. NCAA, 198 F.3d 107 (3d Cir. 1999) 19-21, 23-24

Cureton v. NCAA, 37 F. Supp. 2d 687 (E.D. Pa. 1999) 18-21, 23-24

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 5-7

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) 3-5

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 12

Lau v. Nichols, 414 U.S. 563 (1974) 9-10

Lewis v. Casey, 518 U.S. 343 (1996) 14-15

Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989) 10-11

TABLE OF AUTHORITIES—Continued

Page

New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 7

Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979) 13-14

Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers, 531 U.S. 159 (2001) 16

Village of Arlington Heights v. Metro. Housing Development Corp., 429 U.S. 252 (1977) 13-14

Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989) 6-7

Washington v. Davis, 426 U.S. 229 (1976) 13-15

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 8, 17-18

Statutes

29 U.S.C. § 621 2-3

§ 623 3

33 U.S.C. § 1344(a) 16

42 U.S.C. § 2000e 5

§ 2000e-2(a)(2) 10

§ 2000e-2(h) 11, 22

§ 2000e-2(l) 12

§ 2000e-5 12

TABLE OF AUTHORITIES—Continued

Page

Court Rules

Supreme Court Rule 37.3(a) 1

Rule 37.6 1

Miscellaneous

Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776 1

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation, respectfully submits this brief amicus curiae in support of Respondents Florida Power Corporation and Florida Progress Corporation. All parties consented to the filing of this brief and their letter of consent has been lodged with the Clerk of this Court.[1]

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF considers this case to be significant in that it concerns the scope of disparate impact, a doctrine that is often counterproductive to the public interest.

STATEMENT OF THE CASE

This Court granted certiorari to determine the following question:

> Is the disparate impact method of proving age discrimination available to plaintiffs suing under the Age Discrimination in Employment Act?

The facts of this case are simply stated. Florida Power Corporation (FPC) is a publicly-regulated electric utility. After the enactment of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, FPC terminated the Plaintiffs during a series of corporate reorganizations for the claimed purpose of maintaining its competitiveness in the newly deregulated market. The Plaintiffs sued FPC and its parent company on the basis that FPC had discriminated against them because of their age in violation of the Age Discrimination in Employment Act

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.* The United States District Court for the Middle District of Florida ruled that as a matter of law the disparate impact theory of liability is not available under the ADEA. The district court then certified this issue to the Eleventh Circuit. *Adams v. Florida Power Corporation*, 255 F.3d 1322, 1323 (11th Cir. 2001). The Eleventh Circuit affirmed that disparate impact claims may not be brought under the ADEA. *Id.* at 1326. This Court granted certiorari.

SUMMARY OF ARGUMENT

The wording of the ADEA shows Congress intended to address only intentional discrimination on the basis of age and not policies or acts that merely have a disparate impact. This Court developed disparate impact analysis to combat the vestiges of intentional discrimination and not mere statistical disparities.

It has been administrative agencies and the courts that implemented disparate impact liability. Congress has only sought to limit its application. This Court has also sought to limit disparate impact liability by requiring proof of intentional discrimination in Equal Protection Clause cases.

Public policy considerations counsel against any expansion of disparate impact liability. Disparate impact is based on administrative regulations that contravene the intent of Congress. Requiring proportional impact leads to implementation of quota systems. Lastly, the disparate impact doctrine is subject to abuse that exacerbates the societal problems it was intended to remedy.

ARGUMENT

I

NEITHER CONGRESSIONAL INTENT NOR THIS COURT'S PRECEDENTS JUSTIFY DISPARATE IMPACT LIABILITY UNDER THE ADEA

A. This Court Has Suggested That the ADEA Encompasses Only Disparate Treatment

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.*, provides in pertinent part:

> (a) . . . It shall be unlawful for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .
>
> . . . .
>
> (f) . . . It shall not be unlawful for an employer . . . .
>
> (1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section . . . where the differentiation is based on reasonable factors other than age . . . .

29 U.S.C. § 623.

The issue is whether this language authorizes disparate impact liability. This Court noted in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that it has long "distinguished between 'disparate treatment' and 'disparate impact' theories of employment discrimination." *Id.* at 609.

> Disparate treatment . . . is the most easily understood type of discrimination. The employer

simply treats some people less favorably than other because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . .

> Claims that stress disparate impact [by contrast] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate impact theory.

Id. (internal quotation marks omitted).

This Court has thus made clear that the disparate treatment theory is available under the ADEA. *Id.* "In a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. As this Court explained:

> Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age.

Id.

While this Court specifically stated that it was not deciding whether a disparate impact theory of liability is available under the ADEA, *id.* at 610, its language in *Hazen Paper* strongly suggests that the answer is no. This Court declared:

> Thus the ADEA commands that "employers are to evaluate [older] employees . . . on their merits and not their age." The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Id. at 611 (citation omitted).

This Court explained: "When the employer's decision *is* wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is." *Id.* The essence of the disparate impact theory is the correlation of a facially neutral factor with the protected status. Thus, the mere fact that conduct motivated wholly by factors other than age falls more heavily on the protected age group does not give rise to an ADEA violation. As this Court explained, ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore." *Id.* at 612.

B. Disparate Impact Liability Was Developed to Combat Intentional Discrimination; Mere Statistical Disparity Does Not Constitute Discrimination

The doctrine of "disparate impact" saw its initial judicial application in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). There this Court ruled that an employer's requirement that job applicants have completed high school and pass a general intelligence test discriminated against blacks in violation of Title VII, 42 U.S.C. §§ 2000e, *et seq.* (prohibiting employment discrimination on the basis of race, color, religion, sex, or national origin), because it excluded a higher proportion of blacks than whites and was not demonstrably related to actual ability to do the work. *Griggs*, 401 U.S. at 431-32. The ruling

in *Griggs* was clearly influenced by the fact that the employer had a history of overt racial discrimination which had apparently ceased after the enactment of the Civil Rights Act of 1964, although the employer continued to follow policies that had a markedly disproportionate effect on blacks. *Id.* at 428-29. *Griggs* created the following standard: "The [Civil Rights] Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . . If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. Although this Court attempted to qualify the standard,[2] that attempt has often been ignored by the lower federal courts.

C. The Sole Rationale for Disparate Impact Is Preventing Pretexts for Discrimination

The only legitimate purpose behind the development of the disparate impact theory would be to prevent the use of facially neutral standards as a pretext for racial discrimination, not to require race quotas. This was made clear in *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642 (1989):

> The touchstone of this inquiry is a reasoned review of the employer's justification for his use of the challenged practice. A mere insubstantial justification in this regard will not suffice, because such a low standard of review *would permit discrimination to be practiced through the use of spurious, seemingly neutral employment practices.*

Id. at 659 (emphasis added).

[2] Congress did not intend by Title VII, however, to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

This Court reemphasized this point in noting that plaintiffs could show that other selection devices without a similarly undesirable impact would also serve the defendant's legitimate interests. By such a showing, the plaintiffs "would prove that [defendant was] '*using [its] tests merely as a "pretext" for discrimination.*'" *Id.* at 660 (emphasis added). This Court thus suggested that the disparate impact doctrine was intended to address pretexts for discrimination, not mere numerical disparities.

This Court has not been consistent in stating that disparate impact is merely the manifestation of pretextual discrimination. *Griggs*, 401 U.S. at 432, found that a plaintiff need not necessarily prove intentional discrimination in order to establish that an employer had violated the statute. Yet, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), this Court stated that a showing that other tests or selection devices were available that served the employer's legitimate business needs but did not have an undesirable racial effect would be evidence that the employer was using its tests as a pretext for discrimination. *Id.* at 425. This suggested a need to show discriminatory intent in order to invoke disparate impact analysis. *Albemarle* was followed by *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979), which rejected a claim that an employer's strict drug abuse enforcement policy had a disparate impact on minorities and thereby violated Title VII. This Court ruled that the trial court's finding that the policy was not motivated by racial animus "forecloses any claim . . . that it was merely a pretext for intentional discrimination." *Id.* at 587. Again,

intentional discrimination was the necessary predicate for liability.

Next, *Connecticut v. Teal*, 457 U.S. 440 (1982), in rejecting the so-called "bottom-line" defense of racial proportionality in the workforce,[3] declared that, even if the employer shows the job relatedness of a test, "the plaintiff may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination." *Id.* at 447. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), cited factors such as the cost of proposed alternative employee selection devices as "relevant in determining whether the challenged practice has operated as the functional equivalent of a pretext for discriminatory treatment." *Id.* at 998.

On the other hand, *Watson* also stated that "the necessary premise of the disparate impact approach is that some employment practices, adopted without a deliberately discriminatory motive, may in operation be functionally equivalent to intentional discrimination." *Id.* at 987. It would thus appear that this Court has not been able to decide on the precise role of the disparate impact analysis in civil rights law. However, since the purpose of civil rights laws is to preclude intentional discrimination, the only proper basis for disparate impact analysis is when the challenged policies or acts are pretexts for discrimination.

[3] The bottom-line defense argued that if an employer achieved racial proportionality in its workforce, it did not matter if any employment or promotion practice was racially biased. *Id.* at 442.

II

THE COURTS AND ADMINISTRATIVE AGENCIES, NOT CONGRESS, HAVE EXTENDED DISPARATE IMPACT ANALYSIS TO OTHER LAWS

A. Administrative Agencies Have Expanded the Scope of Disparate Impact Analysis to Other Laws

The disparate impact doctrine was extended from Title VII to Title VI in *Lau v. Nichols*, 414 U.S. 563 (1974). There, nonEnglish-speaking students of Chinese ancestry sued San Francisco school officials alleging that the school district's failure to provide equal educational opportunities violated the Fourteenth Amendment and Title VI. *Id.* at 566. This Court did not reach the Equal Protection Clause argument but instead relied solely on Section 601 of Title VI. *Id.* Although this Court did not use the term "disparate impact," it cited Department of Health, Education & Welfare (HEW) regulations[4] issued pursuant to Section 602 that barred acts that have the effect of discrimination, even though there is no purposeful design to discriminate. *Id.* at 568.

The concurring opinion of Justice Stewart, joined by the Chief Justice and Justice Blackmun, raised a fundamental issue: "The critical question is . . . whether the regulations and guidelines promulgated by HEW go beyond the authority of § 601." The concurrence noted that the validity of a regulation promulgated under a general authorization provision such as Section 602 of Title VI "'will be sustained so long as it is "reasonably related to the purposes of the enabling legislation.'" *Id.* at 571 (footnote omitted).

[4] This Court also took note of HEW guidelines that required federally funded school districts to rectify students' language deficiencies. *Id.* at 566-67.

This rationale was rejected by *Alexander v. Sandoval*, 532 U.S. 275 (2001), which found that *Lau* interpreted Section 601 itself to prohibit disparate impact discrimination. *Id.* at 285. This Court then noted it

> must face now the question avoided by *Lau*, because we have since rejected *Lau's* interpretation of § 601 as reaching beyond intentional discrimination. It is clear now that the disparate-impact regulations do not simply apply § 601–since they indeed forbid conduct that § 601 permits–and therefore clear that the private right of action to enforce § 601 does not include a private right to enforce these regulations.

Id. (citation omitted). Although phrased in terms of the private right of action issue, this recognition that disparate impact regulations forbid conduct permitted by Section 601 signals that since Congress did not authorize disparate impact liability, this Court may be ready to abandon the theory, at least in Title VI cases.

B. Congress Has Limited Disparate Impact Liability

Although Congress has acknowledged the courts' imposition of disparate impact analysis on the statutory scheme of Title VII, it has shown its discomfort with the concept by moving to limit its application. For example, Title VII specifically provides that seniority systems are exempt from disparate impact in the employment context. *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989), held that the petitioners' allegation of a disparate impact on men and women would ordinarily suffice to state a claim under Section 703(a)(2), 42 U.S.C. § 2000e-2(a)(2), since that provision reaches " 'practices that are fair in form, but discriminatory in operation.' " *Lorance*, 490 U.S. at 904. However, *Lorance* found that the claim involved a seniority system and that

seniority systems are afforded special treatment under Title VII by reason of Section 703(h).[5] This Court concluded:

> We have construed this provision to mean that absent a discriminatory purpose, the operation of a seniority system cannot be an unlawful employment practice even if the system has some discriminatory consequences. Thus, for liability to be incurred there must be a finding of actual intent to discriminate on [statutorily proscribed] grounds on the part of those who negotiated or maintained the [seniority] system.

Lorance, 490 U.S. at 905 (internal citations and quotation marks omitted; brackets in original).

Congress further attempted to restrict the use of disparate impact analysis with regard to ability tests for employment by enacting Section 703(h) which provides in part:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.

42 U.S.C § 2000e-2(h).

---

[5] Notwithstanding any other provision of this title . . . it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(h).

Congress also addressed the use of disparate impact in test scores through the enactment of Section 703(l), entitled "Prohibition of Discriminatory Use of Test Scores":

> It shall be an unlawful employment practice for a respondent, in connection with the selection or referral of applicants or candidates for employment or promotion, to adjust the scores of, use different cutoff scores for, or otherwise alter the results of, employment related tests on the basis of race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(l).

Thus even though cutoff scores, for example, may have a disparate impact on the basis of race or sex, employers are prohibited by Section 703(l) from adjusting those scores to achieve a more proportional result.

Congress also limited the use of disparate impact analysis by prohibiting the award of punitive damages in such cases. Thus, a plaintiff in an action brought under Section 706, 42 U.S.C. § 2000e-5 of the Civil Rights Act, may recover compensatory and punitive damages by alleging unlawful intentional discrimination but not where the charge is merely one of disparate impact. *Landgraf v. USI Film Products*, 511 U.S. 244, 252 (1994).

These provisions show that while Congress has acceded to this Court's imposition of disparate impact liability in Title VII, it has limited its application. More relevant here, there is no indication that Congress ever intended to permit expansion of the doctrine beyond Title VII to other laws such as the ADEA.

III

RECOGNIZING THE FLAWS OF DISPARATE IMPACT, THIS COURT HAS LIMITED ITS APPLICATION

Although this Court has recognized the concept of disparate impact, it has been uneasy with its application and has often sought to limit it. In *Washington v. Davis*, 426 U.S. 229 (1976), black applicants for a police training program sued alleging that the failure rate of blacks was four times that of whites. As evidence of discriminatory intent in the admissions process, the petitioners offered the disparate effect of the test on blacks as compared to whites. *Id.* at 233. This Court held that the petitioners had failed to prove a violation of the Equal Protection Clause. *Id.* at 242. This Court declared that discriminatory intent is the critical element in an equal protection claim and, though disparate impact is not irrelevant to such claim, it is not sufficient as proof of intent. *Id.*

In *Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252 (1977), nonprofit housing developers planned to develop a tract of land into a racially diverse neighborhood for residents with low to moderate incomes. When the village refused to rezone the land for multifamily housing, the developers sued under the Equal Protection Clause, alleging the refusal was racially motivated. *Id.* at 258-59. This Court found that the plaintiffs had failed to prove the key element of discriminatory intent. *Id.* at 270. This Court held that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact." *Id.* at 264-65.

The applicability of disparate impact in cases of alleged sex discrimination was addressed in *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979). *Feeney* involved an equal protection claim that the award of veterans preference in employment had a disparate impact on women,

proportionably fewer of whom were veterans. This Court noted that *Washington v. Davis* and *Arlington Heights* recognized that when a neutral law has a disparate impact upon a group that has historically been the victim of discrimination, an unconstitutional purpose may be at work. But this Court found that those cases signaled no departure from the settled rule that the Fourteenth Amendment guarantees equal laws, not equal results and this principle applies with equal force to a case involving alleged sex discrimination. *Id.* at 273-74. As this Court concluded:

> When a statute gender-neutral on its face is challenged on the ground that its effects upon women are disproportionally adverse, a twofold inquiry is thus appropriate. The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination. In this second inquiry, impact provides an important starting point, but purposeful discrimination is the condition that offends the Constitution.

Id. at 274 (internal citations and quotation marks omitted).

This Court emphasized this point in *Lewis v. Casey*, 518 U.S. 343 (1996) (involving prisoners' right of access to the courts), noting that it rejected the disparate impact theory of the Equal Protection Clause in *Washington v. Davis*.

> There we flatly rejected the idea that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. We held that, absent proof of discriminatory purpose, a law or official act does not violate the Constitution, *solely* because it has a . . . disproportionate impact.

Id. at 375 (internal citations and quotation marks omitted).

This Court read *Davis* as "acknowledging the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* (internal citations, quotation marks, and parentheses omitted).

Lewis recognized that the *Davis* Court was motivated in no small part by the potentially radical implications of the disparate-impact rationale.

> Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent. Under a disparate impact theory . . . regulatory measures always considered to be constitutionally valid, such as sales taxes, state university tuition, and criminal penalties, would have to be struck down. . . . [W]e rejected in *Davis* the disparate impact approach in part because of the recognition that [a] rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.

Id. at 376-77 (internal citations and quotation marks omitted).

These acknowledged dangers of the disparate impact rationale present compelling reasons for not extending the doctrine's application to the ADEA.

IV

SOUND PUBLIC POLICY REASONS REJECT EXPANSION OF DISPARATE IMPACT LIABILITY TO THE ADEA

A. Disparate Impact Liability Is Based on Unauthorized Administrative Regulations

The *Adams* Petitioners point out that disparate impact is recognized in administrative regulations implementing the ADEA. Brief for Petitioners at 34-37. This Court's growing concern with abuse of the administrative regulatory process was signaled in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001). In invalidating regulations implementing Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a) (regulating the discharge of dredged and fill material into navigable waters) this Court declared:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.

Solid Waste, 531 U.S. at 172-73 (citation omitted).

The disparate impact doctrine is based on the fundamental legal error that administrative regulations may interpret a law contrary to the intent of the legislative body that enacted it. In order not to invalidate a whole range of tax, welfare, public service, and regulatory acts that inadvertently may be more burdensome in their effect on older workers, Congress intended the ADEA to follow Fourteenth Amendment law and apply only to intentional discrimination. Administrative agencies

have no power to alter that policy judgment by extending the law's reach to ban programs that have a disproportionate impact on certain age groups.

B. Disparate Impact Raises the Specter of Quotas

The potential for administrative regulations to be applied in such a manner as to require the use of quotas in direct opposition to the intent of Congress and the mandate of the Fourteenth Amendment was noted with disfavor in *Watson v. Fort Worth Bank & Trust*, 487 U.S. at 992.

> We agree that the inevitable focus on statistics in disparate impact cases could put undue pressure on employers to adopt inappropriate prophylactic measures. It is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces. Congress has specifically provided that employers are *not* required to avoid "disparate impact" as such.

Id. at 992 (citation omitted).

Watson arose in the context of Title VII allegations of employment discrimination. This Court noted that preferential treatment and the use of quotas by public employers under Title VII can violate the Constitution "and it has long been recognized that legal rules leaving any class of employers with 'little choice' but to adopt such measures would be 'far from the intent of Title VII.'" *Id.* at 993 (citations omitted). This Court observed:

> If quotas and preferential treatment become the only cost-effective means of avoiding expensive litigation

> and potentially catastrophic liability, such measures will be widely adopted. The prudent employer will be careful to ensure that its programs are discussed in euphemistic terms, but will be equally careful to ensure that the quotas are met. Allowing the evolution of disparate impact analysis to lead to this result would be contrary to Congress' clearly expressed intent . . . .

Id.

The same logic applies to ADEA. Allowing this law to evolve into a mandate for age-based quotas would be contrary to Congress' clear intent.

C. Disparate Impact Is Particularly Subject to Abuse

The use of disparate impact analysis as a surrogate for quotas is only its most obvious abuse. Some plaintiffs have relied on the confusion in the courts over the disparate impact standard to pursue ends that Congress could not have contemplated. The following case studies provide examples of the risk of abuse inherent in the disparate impact doctrine.

1. *Cureton v. National Collegiate Athletic Association*

The National Collegiate Athletic Association (NCAA) is a voluntary, unincorporated association of four-year colleges and universities located throughout the United States. The members are divided for purposes of athletic competition into Divisions I, II, and III. During the 1986-87 school year, NCAA's Division I membership implemented Proposition 48 which required high school graduates to have a 2.0 grade point average (GPA) in 11 academic core courses and a minimum score of 700 on the Scholastic Aptitude Test (SAT) (or 15 on the ACT) in order to participate in Division I athletics. *Cureton v. NCAA*, 37 F. Supp. 2d 687, 690 (E.D. Pa. 1999).

Proposition 48 was modified by Proposition 16 in 1992 which increased the number of required core courses to 13 and used a sliding scale eligibility index. Four African-American student athletes who failed to achieve eligibility because they did not meet the minimum standardized test score sued the NCAA claiming that the minimum test score requirement has an unjustified disparate impact on African-Americans in violation of Title VI and implementing regulations. The United States District Court for the Eastern District of Pennsylvania agreed and granted the plaintiffs' motion for summary judgment. *Id.* at 715.

The Third Circuit reversed, but avoided a decision on the merits. Instead, the court found that the NCAA was not subject to Title VI as it was not itself (as distinct from its member colleges and universities) a recipient of federal funding. *Cureton v. NCAA*, 198 F.3d 107, 115 (3d Cir. 1999). The court, however, expressed its concern as to the scope and impact of the disparate impact doctrine.

> In reaching our result, we also point out the following. Neither Congress nor the Departments of Health and Human Services or Education has considered, at least in a formal proceeding of which we are aware, what the consequences would be if the disparate impact regulations were expanded beyond their current program specific limitations. It might well be that such expanded regulations could subject all aspects of an institution of higher education's activities to scrutiny for disparate discriminatory impact beyond anything Congress could have intended.

Id.

Judge McKee, concurring and dissenting, *id.* at 119, observed that although this dispute was framed by issues of race, the record below noted:

> Low-income student-athletes also have been impacted to a greater degree than other student-athletes by Proposition 16 standards. For example, in 1997, 18 percent of all student-athletes with a self-reported family income below $30,000 failed to qualify, whereas only 2.5 percent of student-athletes with a family income greater than $80,000 failed to qualify.

Based on this data, Judge McKee found that Proposition 16 had a disparate impact on poor student-athletes regardless of race. He concluded: "Thus, the dynamics of the disparate impact here are the dynamics of socio-economic status. These are issues of class; not race." 198 F.3d at 119. This is a distinction that has escaped the administrative agencies who have expanded the reach of the disparate impact doctrine.

In the scholastic context, the fixation on meeting race quotas while ignoring other issues such as socio-economic status has grave consequences. Using the district court's rationale, the use of the SAT to award National Merit Scholarships would violate Title VI if the awards were not precisely racially proportionate. Indeed, the use of objective standards such as the SAT and GPAs to award any type of scholarship or recognition would violate Title VI if the results did not comport with the racial profile of the test takers. The concept of subordinating individual academic excellence (or even, as in *Cureton*, bare adequacy) to racial proportionality would have a devastating effect on the motivation of high school students. Taken to its logical conclusion, the use of any cutoff point, such as a requirement of a 2.0 GPA in order to graduate from high school, would have violated the district court's interpretation of Title VI if it had a disparate impact on minorities. The district court's remedy would "dumb down" the standards so that everyone would qualify. While this would negate "disparate impact discrimination," it would also remove a significant incentive for students to apply themselves to their

studies. There had been no showing in *Cureton* that the NCAA used the SAT cutoff score as a pretext for race discrimination. In the absence of such a showing, it would have been a grave misuse of Title VI to require precise numerical proportionality for eligibility based on test results and GPA. The necessary result of such dogmatism would be to destroy the incentive of students, particularly those coming from a background of poverty, to study and prepare themselves for life after athletics.[6]

2. *Association of Mexican-American Educators v. California*

In 1983, the California Legislature amended the state Education Code to prohibit the state commission on teacher credentialing from issuing a credential for teaching in the state public schools unless the applicant has demonstrated proficiency in basic reading, writing, and mathematics skills. The Legislature further authorized the state Superintendent of Public Instruction to adopt an appropriate test to measure proficiency in these basic skills. Pursuant to that mandate, the superintendent adopted the California Basic Education Skills Test (CBEST). CBEST is a pass/fail examination comprised of three sections: reading, writing, and mathematics. The reading and mathematics sections each contain 50 multiple choice questions, 40 of which are scored. The writing section consists of two essays. Since the inception of CBEST, minority applicants have disproportionately received failing scores. *Association of Mexican-American Educators v. California*, 231 F.3d 572, 577-78 (9th Cir. 2000).

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[6] Following the adoption of Proposition 48, Division I college graduation rates for all student-athletes improved by more than 10% and the graduation rate for African-American student athletes improved by 27%. And despite the more rigorous academic standards, African-Americans were awarded 24% of the Division I athletic scholarships. Brief for Amicus Curiae National Collegiate Athletic Association in Support of Petitioners, *Alexander v. Sandoval*, 532 U.S. 275 (2001) (No. 99-1908).

A class action was brought under Titles VI and VII on behalf of all Latinos, African-Americans, and Asians who have been, are being, or will be adversely affected by CBEST results in their ability to obtain teaching credentials. *Id.* Although based on the technical allegations that CBEST had not been properly validated, *id.* at 584, and that the cut-off score was too high, *id.* at 589, the basic thrust of the lawsuit was that the test was too hard. The Ninth Circuit, sitting en banc, found that Title VII applied, *id.* at 584, and affirmed the trial court ruling that "'the passing scores on the CBEST reflect reasonable judgments about the minimum level of basic skills competence that should be required of teachers.'" *Id.* at 590. The court could have cited, but did not, Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), which provides it is not unlawful for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results, is not designed, intended, or used to discriminate on the basis of factors such as race or national origin. CBEST was developed with the assistance of the Educational Testing Service, an organization "well known and respected as a developer of standardized tests." *Association*, 231 F.3d at 588. Further, there was no suggestion that CBEST was intended to discriminate on the basis of race. The state was therefore able to avoid the embarrassment of being forced to license teachers who were themselves woefully deficient in education. However, the state did not get off unscathed. The court refused to award the state its more than $216,000 of court costs (none of which were attorneys' fees) after years of litigation. *Id.* at 591-93. Thus, even though the state ultimately prevailed, it was only at a great cost of time and taxpayers' money.

3. *African American Legal Defense Fund v. New York State Department of Education*

Another example of the use of the disparate impact standard for counterproductive purposes is *African American*

Legal Defense Fund, Inc. v. New York State Department of Education, 8 F. Supp. 2d 330 (S.D. N.Y. 1998). This lawsuit, brought under the implementing regulations to Title VI, claimed that the State of New York's statutory policy of funding the public schools based on attendance had a disparate impact on minority students because of their lower attendance rates. Since minority students were absent more frequently than nonminorities, schools with large minority populations received proportionately less state funding than schools with smaller ratios of minorities. The plaintiffs suggested that state funding be based instead on student enrollment without regard to actual attendance. *Id.* at 338. The district court, however, found that

> with respect to plaintiffs' claim that the attendance-based system of distribution has a disparate impact on minorities because of such factors as single parenting, poor housing, and medical problems, which contribute to absenteeism among inner-city students, . . . one cannot look to Title VI's regulations for remedy for any alleged disparate impact of this nature, however real and distressing. . . . [C]learly it is not [the schools'] practices that have produced the absenteeism. Accordingly, Title VI's regulations support no action at law upon those factors.

Id. at 338-39.

The court thereupon dismissed the claim. *Id.* at 339. The alternative would have been to remove the incentive for schools to discourage absenteeism on the part of minority students, a policy with disastrous import for the education of those students.

Cureton, Association of Mexican-American Educators, and *African American Legal Defense Fund* showcase the less apparent negative impact of the disparate impact doctrine. In the name of avoiding discrimination, these cases sought to

impose policies that would have had an extremely detrimental impact on society in general and minorities in particular. Dumbing down high school grade and test score requirements in *Cureton* may have made more black athletes eligible to compete at the varsity level as freshmen, but by removing the incentive to study in high school, the policy would have ensured a high failure rate for these individuals in college and ultimately in life. Dumbing down the CBEST in *Association* would have qualified more minorities to teach, but would have removed any incentive for those individuals to improve their knowledge of basic academics and would have provided an inferior education, not to mention a negative role model, for their students. Lastly, a neutral policy on minority absenteeism in the public schools, as sought in *African American Legal Defense Fund*, would send the negative message that absenteeism is an expected characteristic of minority students and therefore must be accepted.

These cases are symptomatic of the inherent problems of the disparate impact doctrine. As Judge McKee noted in *Cureton*, 198 F.3d at 119, the dynamics of disparate impact in Civil Rights Act cases are most frequently those of socio-economic status of class rather than race. Similarly, in ADEA cases, there may well be age-neutral reasons for the policy at issue.

It is time for the courts to rethink the use of disparate impact. When a disparity is caused by intentional discrimination, it should be remedied in an appropriate manner. That is what Congress intended in the enactment of the ADEA and the Civil Rights Act. But when a disparity is the result of policies that result not from intentional discrimination but from neutral factors, the courts should decline to intervene. By focusing on intentional discrimination, the courts can ensure that it is rooted out wherever it may be found. At the same time, by discarding the disparate impact doctrine, the courts can

guard against outcomes that, while well-meaning in intent, are disastrous in practice.

CONCLUSION

For the reasons stated above, the decision of the Eleventh Circuit should be affirmed.

DATED: February, 2002.

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Supreme Court, U.S.
FILED
FEB 25 2002
OFFICE OF THE CLERK

No. 01-584

In the Supreme Court of the United States

WANDA ADAMS, *et al.*

Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,

Respondents.

ON A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF ATLANTIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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February 2002

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TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

QUESTION PRESENTED 2

SUMMARY OF ARGUMENT 2

I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE ADEA SUGGESTS THAT A DISPARATE IMPACT CAUSE OF ACTION LIES 3

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Cases

Albemarle Paper Co. v. Moody, 422 U.S. 405(1975) 3, 4

Allen v. Diebold, Inc., 33 F.3d 674, 677 (6th Cir. 1994) 8

Andrus v. Shell Oil Co., 446 U.S. 657 (1980) .....

City of Los Angeles v. Manhart, 435 U.S. 702 (1978) 8-9

County of Washington v. Gunther, 452 U.S. 161(1981) 8

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 6, 7

Hazen Paper v. Biggins, 507 U.S. 604 (1993) 5, 7

Metz v. Transit Mix, Inc., 828 F.2d 1202 (7th Cir.1987) 7

Mullin v. Raytheon Co., 164 F.3d 696, 702 (1st Cir. 1999),
cert. denied, 528 U.S. 811 (1999) 8

Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988) ... 10

Seatrain Shipbuilding Corp. v. Shell Oil Co.,
444 U.S. 572, 596 (1980) 10

Wards Cove v. Atonio, 490 U.S. 642 (1989) 9

Watson v. Fort Worth Bank, 487 U.S. 977, 991 (1988) *passim*

TABLE OF AUTHORITIES (continued)

Page

Statutes

Age Discrimination in Employment Act of 1967,
29 U.S.C. sec. 626(f) ..... *passim*

Age Discrimination in Employment Act Amendments,
Pub.L. No. 102-166, 105 Stat. 1071 (1991) 9

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-
2000e-17 ..... *passim*

Articles

Douglas Laycock, *Continuing Violations,*
Disparate Impact in Compensation,
and Other Title VII Issues,
49 L. & Contemp. Prob. 53, 55 (Aug.1986) 7

Michael C. Sloan, "Disparate Impact in the Age
Discrimination in Employment Act,"
1995 Wis.L.Rev. 507, 517 (1995) 6

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INTEREST OF *AMICUS CURIAE*

Atlantic Legal Foundation is a non-profit, non-partisan, 501(c)(3) public interest law firm whose mandate is to advocate and protect the principles of limited government, the free-market system and individual rights. [1,2] ALF seeks to advance these goals

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[1] Letters from all parties consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that this brief was not prepared, written, funded or produced by any person or entity other than the *amicus curiae* or its counsel.

through litigation and public advocacy, and education. Its interest in this case derives from its concern that use of "disparate impact" theory of employment discrimination to the Age Discrimination in Employment Act ("ADEA") and other statutes that affect the employment relationship will unduly interfere with employers' reasonable economic decisions, will distort the marketplace, and will adversely affect the rights of employees who are not in the "protected class."

QUESTION PRESENTED

Is the disparate impact method of proving employment discrimination available to plaintiffs suing under the Age Discrimination in Employment Act?

SUMMARY OF ARGUMENT

Disparate impact theory is not a viable theory of liability under ADEA because the statutory language does not explicitly provide for disparate impact liability and the policies underlying the ADEA, of prohibiting employers from acting upon assumption that productivity and competence decline with old age, are not implicated in disparate impact cases. The subsequent history of the ADEA and of Title VII show that Congress did not intend the ADEA to create a claim for liability based on disparate impact. This Court has never held that discrimination must always be inferred from different impacts on different employees or groups of employees of a firm's employment policy, and it should not do so absent explicit Congressional intent. The judicial creation of disparate impact liability would have unintended consequences of encouraging employers to adopt quotas and preferences, and distort market-based rational economic decisions.

I. NEITHER THE LANGUAGE NOR THE LEGISLATIVE HISTORY OF THE ADEA SUGGESTS THAT A DISPARATE IMPACT CAUSE OF ACTION LIES

This Court recognized in *Watson v. Fort Worth Bank*, 487 U.S. 977, 991 (1988) that there is a reasonable concern on the part of employers that

> a plaintiff may establish a prima facie case of disparate impact through the use of bare statistics, and that the defendant can rebut this statistical showing only by justifying the challenged practice in terms of "business necessity," *Griggs*, 401 U.S., at 431, 91 S.Ct., at 853, or "job relatedness," *Albemarle Paper Co.*, 422 U.S., at 426, 95 S.Ct., at 2375. Standardized tests and criteria, like those at issue in our previous disparate impact cases, can often be justified through formal "validation studies. . ."

The disparate impact theory makes it likely that any employer who had a segment of his work force that was "imbalanced" by race, gender or age could be forced to engage in the expensive and time-consuming task of defending the "business necessity" of the methods used to select the members of its work force. "The only practicable option for many employers would be to adopt. . .quotas, insuring that no portion of their work forces deviated in. . .composition from the other portions thereof. . . ." and would ". . .leave the employer little choice. . .but to engage in a subjective quota system of employment selection." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring in the judgment).

The "inevitable focus" on statistics in disparate impact cases puts undue pressure on employers to adopt measures to make sure that their employment practices can withstand disparate impact analysis which will "create a Hobson's choice for employers and thus to lead in practice to perverse results." *Watson*, 487 U.S. at 993. Quotas and preferential treatment for "protected" classes will become the only cost-effective means of avoiding expensive litigation, and already such measures have been widely adopted. Employers will seek to ensure that their employment policies are described in euphemistic terms, but will be ensure that "diversity" quotas are met.

The spread of disparate impact analysis has led to this result, but is contrary to Congress' clearly expressed intent:

> "Nothing contained in [Title VII] shall be interpreted to require any employer ... to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer ... in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area." 42 U.S.C. § 2000e-2(j).

487 U.S. at 992. See also *Albemarle Paper*, 422 U.S. 405, 449 (1975) (Blackmun, J., concurring). In *Watson*, this Court rightly

expressed a concern that extension of the disparate impact theory can increase the risk that employers will be given incentives to adopt quotas or to engage in preferential treatment. Petitioners do not suggest that this has not, in fact, has happened in the labor market.

This case provides the Court with an opportunity to limit the spread of the use of quotas and preferential treatment, and we urge that the statutory language of the ADEA and its legislative history warrant such a limitation.

While this Court did not expressly decide the viability of disparate impact liability under the ADEA in *Hazen Paper v. Biggins*, 507 U.S. 604 (1993), it noted that disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA." *Hazen*, 507 U.S. at 610. The Court reasoned that the enactment of the ADEA was prompted by Congress' concern that older workers were being deprived of employment on the basis of "inaccurate and stigmatizing stereotypes." *Id.*

This emphasis in *Hazen* on the Congressional purpose behind the ADEA is particularly significant, and we submit compels the conclusion that the ADEA does not provide for a cause of action where plaintiff pleads only "disparate impact" and cannot show disparate treatment or discriminatory intent.

The language of the ADEA does not explicitly provide for disparate impact liability. Section 623(a)(2) makes it "unlawful for an employer . . .(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age. . . ." Petitioners and their supporters argue that the language

quoted above parallels the language in Title VII, and that because this Court's decision in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) interpreted Title VII to permit a plaintiff to prevail on a "disparate impact" theory, that theory is also available in ADEA cases.

When this Court found disparate impact liability under Title VII in *Griggs*, it relied not on any specific statutory language but on the "policies" underling Title VII[3]:

> The objective of Congress in the enactment of Title VII. . .was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

Id. at 429-30[4].

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[3] Congress enacted the ADEA before *Griggs*, and obviously could not have intended literally to incorporate Griggs' "disparate impact" theory to the ADEA by incorporating language from Title VII. Thus, the relevant inquiry is whether the factors that prompted the Court in *Griggs* to recognize disparate impact claims in Title VII apply to the ADEA. *Griggs* did not base its holding on the text of Title VII, but rather looked primarily to the larger objectives underlying Congress' enactment of Title VII. *See Griggs*, 401 U.S. at 429-30; *see also* Michael C. Sloan, "Disparate Impact in the Age Discrimination in Employment Act," 1995 Wis.L.Rev. 507, 517 (1995) ("[T]he *Griggs* Court did not analyze statutory language to justify its decision, but instead relied on its interpretation of congressional intent and legislative history.").

[4] As this Court noted in the plurality opinion in *Watson v. Fort Worth Bank*, 487 U.S. 977 at 987, in *Griggs* the employer had a history of "overt racial discrimination" that predated the enactment of the Civil Rights Act of 1964 and the employer's "requirements operate[d] to disqualify Negroes at a substantially higher rate than white applicants." (Citing *Griggs*, 401 U.S. at 426, and "the employer continued to follow employment policies that had 'a markedly disproportionate' adverse effect on blacks. *Id.* at 428-429."

This "policy" cannot be said to underpin the ADEA, the primary purpose of which is to prohibit employers from acting upon the assumption that "productivity and competence decline with old age." *Hazen*, 507 U.S. at 610. In *Griggs*, the critical fact was the link between the history of educational discrimination and the use of that discrimination as a means of disadvantaging African-Americans in the present. There is no similar history of discrimination based on age.

Congress itself used distinct language in the two statutes. In the ADEA, unlike in Title VII, it provided that "[i]t shall not be unlawful for an employer ... to take any action otherwise prohibited [by this section] where the differentiation is based on reasonable factors other than age...." 29 U.S.C. § 623(f)(1). [emphasis supplied] "The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorized disparate impact." *Metz v. Transit Mix, Inc.*, 828 F.2d 1202, 1220 (7th Cir.1987) (Easterbrook, J. dissenting) (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53, 55 (Aug.1986) (referring to identical language of Equal Pay Act)). The use of this statutory language evidences

Congressional recognition that neutral policies not motivated by discriminatory intent may be permissible employment practices.[5]

The critical difference in the language of the ADEA and Title VII is persuasive evidence that a disparate impact cause of action does not lie under the ADEA. This proviso permits employers to utilize factors other than age as grounds for employment-related decisions that differentially impact members of the protected class (individuals between the ages of 40 and 69). If the exception contained in section 623(f)(1) does not preclude disparate impact liability, it is "nothing more than a bromide to the effect that "only age discrimination is age discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999), *cert denied*, 528 U.S. 811 (1999).

A similar provision in the Equal Pay Act which permits discrepancies in wages paid to male and female workers for "factors other than sex," has been construed to preclude disparate impact claims. *County of Washington v. Gunther*, 452 U.S. 161, 170-71 (1981). In *County of Washington v. Gunther*, this Court compared this limitation on Equal Pay Act liability with Title VII's broadly inclusive prohibition against gender-based discrimination and concluded that the limiting language worked to "confine the application of the Act to wage differentials attributable to sex discrimination." *Gunther*, 452 U.S. at 170, and held that the Equal Pay Act "has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex'." *Id.;*

[5] The ADEA was not intended "to protect older workers from the often harsh economic realities of common business decisions and the hardships associated with corporate reorganizations, downsizing, plant closings and relocations." *Allen v. Diebold, Inc.*, 33 F.3d 674, 677 (6th Cir. 1994).

see also City of Los Angeles v. Manhart, 435 U.S. 702, 710 n. 20, 713 n. 24, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (reasoning that the Equal Pay Act's "other factors other than sex" exception precludes liability based on disparities caused by independent factors). This reasoning suggests that the exception eliminates disparate impact as an available theory of liability under both the Equal Pay Act and the ADEA

The ADEA was, of course, enacted before *Griggs* was decided, and it cannot be said that Congress had in mind the judicial gloss that found the possibility of "disparate impact" liability lurking in the language of Title VII when it crafted the language of the ADEA. However, the post-*Watson* and *post-Wards Cove v. Atonio*, 490 U.S. 642 (1989) legislative history is suggestive. In 1990, in reaction to the strictures placed on "disparate impact" liability by the Court, Congress passed the Civil Rights Act of 1990. As one of Petitioners' *amici* describes it "Congress spent enormous energy addressing the doctrine [of disparate impact] and its implications under Title VII." *See* Brief of Amicus Curiae The Academy of Florida Trial Lawyers at 16-17. The 1990 Act "would have restored the disparate impact doctrine after the *Wards Cove* decision." *Id.* at 17. President Bush vetoed the 1990 Civil Rights Act.

In 1991, Congress amended Title VII to provide explicitly for causes of action based upon disparate impact. *See* Pub.L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). It simultaneously amended the ADEA in numerous respects, *see, e.g., id.* at § 115, 105 Stat. at 1079[6], but it did not adopt language paralleling the Title VII amendments which explicitly created a

[6] *See, e.g.*, § 115, 105 Stat. at 1079 (amending the time period within which an employee may file civil actions); § 302(2), 105 Stat. at 1088 (extending coverage of ADEA to congressional employees).

disparate impact cause of action. We submit that this difference indicates its intent not to provide for a corresponding disparate impact cause of action under the ADEA.

While courts ordinarily should be careful in basing statutory interpretation on the inaction of subsequent Congresses, *see, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306, (1988), Congressional action with respect to a statute in a later legislative session can be a source of guidance in statutory interpretation cases, *see, e.g., Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980). Congress "was no stranger to the disparate impact doctrine" (*see* Brief of Amicus Curiae The Academy of Florida Trial Lawyers at 16) and its inclusion of an express provision for a disparate impact cause of action in Title VII and its failure to adopt such a provision in the ADEA, which was being amended at the same time by the same committees and in the same bill is significant. That Congress knew full well how to include a disparate impact cause of action in the ADEA had it wished to do so[7].

[7] The brief of Academy of Florida Trial Lawyers goes a large step further, and attempts to divine the mind of Congress, speculating (without any citation to legislative proceedings) that "Congressional attention in 1990 was focused on overruling specific Supreme Court and EEOC decisions." Brief of Academy of Florida Trial Lawyers at 18.

CONCLUSION

Disparate impact claims often have insidious consequences, propelling employers to adopt quotas and preferential treatment, to the disadvantage of persons not in a "protected class" and distorting decisions based on sound economic or other business reasons. This was not the intent of Congress.

The ADEA and Title VII diverge structurally in an important way. This divergence and subsequent Congressional action are persuasive indications that Congress never intended to make a disparate impact cause of action available under the ADEA.

For these reasons, we respectfully urge that the decision of the Court of Appeals for the Eleventh Circuit be affirmed.

February 25, 2002

Respectfully submitted,

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Certificate of Service

Martin S. Kaufman, an attorney admitted to practice before the bar of this Court, hereby declares under penalty of perjury that two copies of the foregoing brief of *amicus curiae* Atlantic Legal Foundation in support of the respondent were served on the following counsel of record for the parties on the 25th day of February, 2002, by depositing same in a postal depository box under the care of the United States Postal Service, in a properly addressed, first class postage prepaid envelopes addressed to them at:

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Supreme Court, U.S.
FILED
FEB 22 2002
CLERK

No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 4

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers. . 4

A. Age Discrimination Fundamentally Differs From Race Discrimination. 7

B. The Court's Contemporary Framework For Statutory Construction Does Not Support An Implied Caused Action Based On A Theory of Disparate Impact..... 11

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct..... 12

A. The Language Of Section 623(a) Proscribes Only Disparate Treatment..... 12

B. Section 623(f)(1) Does Not Support Creation Of A Disparate Impact Claim..... 16

C. The Civil Rights Act Of 1991. 24

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim. 27

CONCLUSION 30

TABLE OF AUTHORITIES

FEDERAL CASES

Alexander v. Sandoval, 532 U.S. 275, 121 S.Ct. 1511 (2001) 11, 12, 23, 29

Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998) 28

American Nurses Association v. Illinois, 783 F.2d 716 (7th Cir. 1986) 22

Christensen v. Harris County, 529 U.S. 576 (2000) 27

DiBiase v. SmithKline Beecham Corp., 48 F.3d 719 (3d Cir. 1995) 4, 15, 16

EEOC v. Arabian Amer. Oil Co., 499 U.S. 244 (1991). 28

EEOC v. Wyoming, 460 U.S. 226 (1983) 7, 20

Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996) 6, 12, 13, 14

Griggs v. Duke Power Co., 401 U.S. 424 (1971) ..... *passim*

Guardians Association v. Civil Service Comm'n, 463 U.S. 582 (1983) 29

Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993) ..... *passim*

Hiatt v. Union Pacific R.R. Co., 859 F. Supp. 1416 (D. Wyo. 1994) 10

J.J. Case Co. v. Borak, 377 U.S. 426 (1964) 11

Kirby v. Colonial Furniture Co., 613 F.2d 696 (8th Cir. 1980) 11

Laugesen v. Anaconda Corp., 510 F.2d 307 (6th Cir. 1975) 28

Lewis v. Young Mens Christian Association, 208 F.3d 1303 (11th Cir. 2000) 25

Lumpkin v. Brown, 898 F. Supp. 1263 (N.D. Ill. 1995) 14

Markham v. Geller, 451 U.S. 945 (1981) 29

Marshall v. Westinghouse Electric Corp., 576 F.2d 588 (5th Cir. 1988) 17

Massachusetts Board of Retirement v. Murgia, 427 U.S. 301 (1976) 10

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) 5, 15, 21, 26

McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995) 15

Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999) 6, 13, 16

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 24

Pavlo v. Stiefel Laboratories, Inc.,
Civ. No. 78-5551, 1979 WL 105
(S.D.N.Y. Nov. 27, 1979) 5

Price Waterhouse v. Hopkins, 490 U.S. 228
(1989) 25

Public Employees Retirement System of Ohio v. Betts,
492 U.S. 158 (1989) 18, 29

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133 (2000) 22

St. Marys Honor Center v. Hicks, 509 U.S.
502 (1993) 15

Teamsters v. United States, 431 U.S. 324
(1977) 26

Texas Department of Community Affairs v. Burdine,
450 U.S. 248 (1981) 15

Touche Ross & Co. v. Redington, 442 U.S. 560
(1979) 11

Trans World Airlines, Inc. v. Hardison,
432 U.S. 63 (1977) 17

United States v. Mead Corp., 121 S. Ct. 2164
(2001) 27

United Steelworkers of America v. Weber,
443 U.S. 193 (1979) 17

Wards Cove Packing Co., Inc., 490 U.S. 642
(1989) 14

Washington v. Davis, 426 U.S. 229 (1976) 6

Williams v. City and County of San Francisco,
483 F. Supp. 335 (N.D. Cal. 1979) 5

FEDERAL STATUTES AND REGULATIONS

29 C.F.R. § 860.103 ..... 27, 28

29 C.F.R. § 1625.7(d) 27, 29

29 U.S.C. § 621 2

29 U.S.C. § 622 2

29 U.S.C. § 623 ..... *passim*

29 U.S.C. § 633a 13

29 U.S.C. § 1607.2 (1978) 28

29 U.S.C. § 626 ..... *passim*

42 U.S.C. § 2000 ..... *passim*

Civil Rights Act of 1964,
Pub. L. No. 88-352, 78 Stat. 265 ..... *passim*

Civil Rights Act of 1991,
Pub. L. No. 102-166, 105 Stat. 1071 .... 4, 24, 25

Older Workers Benefit Protection Act of 1990,
Pub. L. No. 101- 433, 101 Stat. 978..... 4, 18, 26

MISCELLANEOUS

American Heritage Dictionary of the English Language 159 (4th ed. 2000) .....*passim*

Age Discrimination in Employment: Hearings on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 90th Cong., 1st Sess. 36 (1967) .....*passim*

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Instant English Handbook (1993 ed.) 15

Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 323 (2000)..... 11

Note, *Discrimination And The NLRB: The Scope Of Board Power Under Sections 8(a)(3) And 8(b)(2)*, 32 U. Chi. L. Rev. 124, 128 (1964)..... 24

Pamela S. Krop, *Age Discrimination And The Disparate Impact Doctrine*, 34 Stan. L. Rev. 837 (1982) 9, 15

The Older American Worker: Age Discrimination In Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965).....*passim*

113 Cong. Rec. 1,377 (1967) 21, 23

113 Cong. Rec. 31,254 (1967) 20

113 Cong. Rec. 31,255 (1967) 21

136 Cong. Rec. 13,596-97 (1990)..... 18

H.R. Rep. 101-664 (1990)..... 18

S. Rep. No. 101-263 (1990) 18

46 Fed. Reg. 47,724 –27 (1981) 28

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents a membership of more than three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in the federal courts in cases addressing issues of widespread concern to the American business community. The Chamber has participated as *amicus curiae* in hundreds of cases before the United States Supreme Court and the Courts of Appeals, including numerous employment discrimination cases. *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

The Chamber fully endorses the Age Discrimination in Employment Act. Reliance on age stereotypes about the abilities of older workers should not be tolerated. Due to natural job progression, however, age affects job terms such as compensation, pension, and seniority. In this context, and where Congress did not so intend, imposing a burden on employers to justify the business necessity of routine and uniform job standards that statistically impact older workers is unjustified.

SUMMARY OF THE ARGUMENT

The disparate impact theory, first recognized in *Griggs v. Duke Power*, a race discrimination case under Title VII of the Civil Rights Act of 1964, does not apply to age

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1/ The parties have consented to the filing of this brief and their letters of consent have been lodged with the Clerk of the Court. Pursuant to S. Ct. R. 37.6, *amicus curiae* states that counsel for a party did not author this brief in whole or in part and that no one other than *amicus*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

discrimination claims. When Congress passed Title VII, it expressly recognized that age discrimination differs from other forms of discrimination. Weighing in Congress' effort to balance employees' and employers' interests in any age legislation was the reality that "a person's age catches up to him."[2/] This had no analogue in Congress' consideration of invidious racial prejudice under Title VII. Therefore, Congress directed the Secretary of Labor to prepare a report to assess whether legislation was necessary to "prevent arbitrary discrimination in employment because of age." Civil Rights Act of 1967 § 715.

Based on the Secretary of Labor's report, Congress enacted the Age Discrimination In Employment Act (ADEA) and designed its proscriptions to redress only "arbitrary discrimination," *see* 29 U.S.C. §§ 621, 623, which resulted from inaccurate and stigmatizing age stereotypes. Congress decided that other factors adversely affecting older workers' employment were more suitably addressed by education and training programs. *See* 29 U.S.C. § 622 (directing Secretary of Labor to develop an education and research program); *Senate Hearings* at 38-39 (statement of Secretary of Labor) (deliberate acts will be prohibited by the legislation; other acts will be remedied by research, education, and training – to do more would be premature).

2/ *See Age Discrimination in Employment: H'gs on S. 830 and S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 90th Cong., 1st Sess. 36, 37 (1967) [hereinafter "*Senate Hearings*"] (statement of Secretary of Labor) (it is an accepted part of the employment relationship "that when 'a person's age catches up to him' and diminishes his capacity and competence, he must accept the fair-minded economic judgment of those he works for…that his value has fallen below the break-even point").

In *Griggs*, the Court created the disparate impact theory with no textual analysis of the statute. The Court subsequently extended the theory only to other Title VII contexts to redress institutional or societal bias that has produced "built in headwinds," "glass ceilings," or "barriers" to the advancement of protected groups. Unlike groups protected by Title VII, older workers have not suffered from lifelong barriers to advancement due to the perpetuation of effects of historical discrimination. Rather, as Congress recognized in passing the ADEA, older workers are affected by stereotypes that develop only as age progresses. The disparate treatment theory, which focuses on motive, is specifically designed to test for age stereotyping, and it is the sole cause of action intended by Congress. This Court's reasoning in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993) compels this result. *Id.* at 610 (a disparate treatment claim, requiring proof that age actually played a determining role in the employer's decisionmaking process, "captures the essence of what Congress sought to prohibit in the ADEA").

Moreover, since *Griggs*, the Court has emphasized a rigorous model of statutory construction. Congressional intent is now analyzed with a stricter focus on the statute's language, structure, and legislative history. Petitioner strains the language of the ADEA to suggest that, because disparate treatment theory requires a showing of "intent," it is underinclusive of the rights and protections that Congress intended to create. But the real issue under the disparate treatment theory is *motive*. An inquiry into motive is necessary and the most suitable means to root out age stereotyping, which is the ADEA's focus.

Reading motive out of the ADEA to allow disparate impact claims would upset the balance struck by Congress. If such claims were available, statistical correlation—having nothing to do with motive—would become dispositive,

subject only to the employer's proof of business necessity. Employers, though not motivated by age, would be forced to justify the business necessity of considering factors such as seniority or pay which, because they correlate with age, have a statistical impact on older workers. *DiBase v. Smithkline Beecham Corp.*, 48 F.3d 719, 734 n.21 (3d Cir. 1995) (allowing disparate impact with its defense of business necessity could "subject employers to unreasonable intrusions by juries into their business practices," such as work schedules and medical insurance). Because age-motivation is required by the language of the statute, and is an element only under the disparate treatment theory, the disparate impact theory is not cognizable under the ADEA.

The Civil Rights Act of 1991 also supports this conclusion. The 1991 Act expressly created a disparate impact claim under Title VII with no right to a jury trial, but did not similarly amend the ADEA, which authorizes jury trials. The Act did not similarly amend the ADEA. This underscores that the ADEA, with its focus on non-invidious stereotypes, differs from Title VII. The Older Workers Benefits Protection Act of 1990 has nothing to say about disparate impact liability. The Act merely requires employers to disclose statistics, which are relevant to all types of discrimination claims, to employees asked to sign waivers that include ADEA rights. Finally, an EEOC guideline purports to create an ADEA disparate impact claim, but is contrary to the statute's language. Neither as originally enacted nor as amended does the ADEA include a disparate impact claim. Thus, no such claim exists.

ARGUMENT

I. The *Griggs* Rationale Does Not Extend To Employment Decisions Affecting Older Workers.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case alleging race discrimination, the Court first

articulated the disparate impact cause of action. Duke Power had openly segregated job titles by race prior to the effective date of Title VII. *Id.* at 427. Upon enactment of Title VII, it adopted a policy requiring a high school diploma or passing scores on two aptitude tests for placement into higher paying jobs. These requirements disparately affected African-American employees. The Court found that the disparate effect was "directly traceable to race," because the long history of societal racism and inferior education in segregated schools had deprived many black employees of the means to manifest their true abilities through standardized tests. *Id.* at 430-31; *see McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) ("*Griggs* was rightly concerned that childhood deficiencies in the education and background of minority citizens, resulting from forces beyond their control, not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives."). Because the employer's job requirements operated "to 'freeze' the status quo of prior discriminatory employment practices," and worked as "built-in headwinds" for the advancement of minority groups, the Court held that the requirements were unlawful if not proven to be job-related. *Id.* at 430-32; *id.* at 431 ("The touchstone is business necessity. If an employment practice cannot be shown to be related to job performance, the practice is prohibited."). Proof of a discriminatory motive was not necessary.

Several Circuit Courts had overlooked the special context of *Griggs* and had simply assumed, prior to 1993, that the disparate impact theory was available to ADEA plaintiffs. *See* Pet. 5 (citing cases). This view did not go unquestioned. *See Pavlo v. Stiefel Labs., Inc.*, Civ. No. 78-5551, 1979 WL 105, 9 n.22 (S.D.N.Y. Nov. 27, 1979) (questioning applicability of *Griggs* to ADEA); *Williams v. City and County of San Francisco*, 483 F. Supp. 335 (N.D. Cal. 1979) (same). In 1993, the Court's reasoning in *Hazen*

Paper, focusing on congressional intent and the difference between age and other forms of discrimination, compelled the conclusion that disparate impact theory is not available under the ADEA. *See* 507 U.S. at 609-11; *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1009 (10th Cir. 1996) (*Hazen* gives "strong impression" that the Court is suggesting that the ADEA does not encompass a disparate impact claim); *Mullin v. Raytheon Co.*, 164 F.3d 696, 701 (1st Cir. 1999) (*Hazen*'s "inescapable implication" is that disparate impact would not address evils that ADEA was designed to purge). The Court held that an employment decision that is motivated by a factor that merely correlates with age, but is analytically distinct from age, does not violate the statute. The Court reasoned that, because the impetus of the ADEA was Congress' "concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes," disparate treatment—with its focus on motive—"captures the essence of what Congress intended to prohibit." *Id.* at 610. When the employer is wholly motivated by factors other than age (as under the disparate impact theory), the problem of inaccurate and stigmatizing stereotypes disappear. *Id.* at 611.

Hazen Paper made clear that the ADEA is a different statute with a different history and purpose than Title VII. *See Mullin*, 164 F.3d at 701 (divergence in purpose between Title VII and ADEA counsels against mechanistic adherence to *Griggs*). The disparate impact theory should not be mechanically transplanted into the ADEA context without first reexamining *Griggs*' rationale in light of those differences. *See Washington v. Davis*, 426 U.S. 229, 255 (1976) (Stevens, J., concurring) (inappropriate simply to transplant Title VII standards into a different statutory scheme having a different history). *Griggs*' rationale is not applicable to the ADEA for two reasons, discussed below. First, *Griggs*' policy justification for developing the disparate

impact theory was aimed at invidious race discrimination and is not transferable to the ADEA context. Second, the policy-based interpretation of Title VII that underpins *Griggs* is an inappropriate analytic methodology for interpreting statutes.

A. Age Discrimination Fundamentally Differs From Race Discrimination.

Although the purpose of both the ADEA and Title VII is to eliminate discrimination in the workplace (AARP at 6), the realities of race and age discrimination differ substantially. During the debates on Title VII, proposals were made to include age discrimination within its prohibitions. *EEOC v. Wyoming*, 460 U.S. 226, 229-30 (1983). Such legislation was deferred, however, because Congress had too little information to make a considered judgment about the nature of age discrimination. *Id.* Suspecting that age differed fundamentally from race and other types of discrimination, Congress directed the Secretary of Labor to study the causes and effects of age discrimination and to prepare a report and recommendations on the need for (and scope of) any age legislation (the "Labor Report").[3/] *Id.*

Unlike race discrimination, the Report found "no evidence of prejudice based on dislike or intolerance of the older worker." Labor Report at 6; *id.* at 2 ("discrimination" based on age "means something very different" than race discrimination). According to the Report, such age prejudices are unusual because the process of aging "is inescapable, affecting everyone who lives long enough," and people of all ages "liv[e] in close association rather than in separate and distinct social or economic environments." *Id.* at 6. Thus,

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3/ *The Older American Worker: Age Discrimination In Employment*, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965).

"age" is not a restricted class in which segregation and lack of association with other groups, as in *Griggs*, may breed rigid biases. Finally, the Report found that, unlike race, color, religion, and sex discrimination, some work-related abilities do correlate with the inevitable process of aging.[4/] Thus, adverse assumptions about older employees' abilities, if examined, sometimes will prove true. Examples noted by the Labor Report include chronic illness, less education, less mobility, lack of transferability of job skills and experience to meet new technology, and less proficiency in testing. Labor Report at 11-15. Therefore, the virtually irrefutable presumption of equaling that is at the core of the legislation prohibiting racial discrimination is not applicable to people in different age groups.

The Labor Report also identified factors that adversely affect older workers in employment, but, because of the unique qualities of ageism, recommended legislation to address only one: "arbitrary age discrimination." Labor Report at 21. Having no intent to recommend legislation against all factors that disparately affect older workers, the Secretary gave "arbitrary discrimination" a specific meaning: "rejection [of older workers] because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for this assumption*." Labor Report at 2.

4/ *See* Labor Report at 2 (identifying acts perhaps not appropriately called "discrimination," such as "decisions not to employ a person for a particular job because of his age when there is in fact a relationship between his age and his ability to perform the job"); *Senate Hearings* at 39 (statement of Secretary of Labor) (challenge in age legislation was drawing a distinction between cases in which there is relevance between age and employment capacity and those cases in which there is not).

(emphasis in original).[5/] Employment policies erecting age limits were the primary and repeated examples of such discrimination. *E.g.*, Labor Report at 6. When Congress enacted the ADEA, it expressly stated its focus on such "arbitrary" age discrimination. *See* 29 U.S.C. § 621.

The ADEA's express focus on "arbitrary" discrimination demonstrates that it was intended to be narrower in scope than Title VII. Pamela S. Krop, *Age Discrimination And The Disparate Impact Doctrine*, 34 Stan. L. Rev. 837, 854 (1982) [hereinafter "Krop, *Age Discrimination*"] (Title VII's purpose is broader than the ADEA's, making disparate impact appropriate only for Title VII); Evan H. Pontz, Comment, *What A Difference The ADEA Makes: Why Disparate Impact Theory Should Not Apply To The Age Discrimination In Employment Act*, 74 N.C. L. Rev. 299-300 (1995) (analyzing meaning of "arbitrary discrimination").[6/] Unlike race and other forms of Title VII discrimination, historical prejudices and lingering effects of prior discrimination cannot justify a disparate

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5/ *See* Labor Report at 21 ("[T]he most serious barriers to the employment of older workers are erected on just enough basis of fact to make it futile as public policy, and even contrary to the public interest, to conceive of all age restrictions as 'arbitrary'..."); *id.* at 5 ("[T]he findings relate to the entire range of factors which tend to have adverse effects on the employment of older workers. Some of these factors involve what is properly identified as arbitrary discrimination. Others do not.").

6/ The *amicus curiae* brief on behalf of the Academy of Florida Trial Attorneys (AFTL) at p. 5 n.5 cites the work of its counsel, Mr. Alfred W. Blumrosen, where he concludes that "arbitrary" discrimination means only "intentional" age discrimination. AFTL appears to contend, however, that although the ADEA originally was so limited, the OWBPA has expanded its scope. As discussed below, this position is untenable.

impact claim under the ADEA. *Hiatt v. Union Pac. R.R. Co.*, 859 F. Supp. 1416, 1436 (D. Wyo. 1994) (unlike in *Griggs*, correlation between age and ability cannot be traced to a history of past discrimination). All older workers were once younger and able to make choices about their education, training, and jobs free from age discrimination. Any current correlation between age and ability cannot be viewed as a product of lifelong discrimination. *See Mullin*, 164 F.3d at 701 (age discrimination correlates with current job conditions, not past discriminatory practices); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 301, 313 (1976) (unlike race, the aged "have not experienced a history of purposeful unequal treatment or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities"). Therefore, an employer's facially neutral practice that has a disparate impact on older workers cannot raise an inference that past discrimination is being perpetuated—there is no past discrimination to perpetuate. Older employees, in fact, may have benefited from past age discrimination during their careers. *Hiatt*, 859 F. Supp. at 1436 (individuals were previously younger and possibly beneficiaries of any age discrimination). Thus, *Griggs*' focus on the concept of perpetuating past discrimination simply does not apply.

Further, although the particular evil of invidious discrimination and its distorting affects on decision making may be an additional reason for applying the disparate impact theory, there is little reason to do so in age discrimination cases. As the Labor Report established, invidious age prejudices are uncommon. In this context, the burden of proving "business necessity" is disproportionate to the harm sought to be remedied. Under the circumstances alleged here, for example, disparate impact theory would require Florida Power to prove a compelling need for which there is no alternative to engage in a reduction in force, or to rely, as it

did, on the kind of uniform selection criteria widely used by the nation's businesses. *See e.g., Kirby v. Colonial Furniture Co.*, 613 F.2d 696, 705 n.6 (8th Cir. 1980) (must show a "compelling need," not routine business considerations, for which there is "no alternative"). The disparate impact theory, with no consideration of motive and a defense only of business necessity, is simply too broad and intrusive to serve as a well-tailored means of identifying and correcting age stereotypes. *See* Nathan E. Holmes, Comment, *The Age Discrimination In Employment Act Of 1967: Are Disparate Impact Claims Available?*, 69 U. Cin. L. Rev. 299, 323 (2000) (business necessity too intrusive a means to identify discriminatory motives and is over-predictive of age discrimination).

B. The Court's Contemporary Framework For Statutory Construction Does Not Support An Implied Cause Of Action Based On The Disparate Impact Theory.

The Court has increasingly emphasized that the interpretation of a statute must begin with its text. *See Alexander v. Sandoval*, 121 S. Ct. 1511, 1519 (2001) (delineating evolution of statutory construction from *J.J. Case Co. v. Borak*, 377 U.S. 426 (1964) to *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) and refusing to imply a private right of action to enforce disparate impact regulations promulgated under Title VI of Civil Rights Act of 1964); Erwin Chemerinsky, *Federal Jurisdiction* § 6.3.3 (2d ed. 1994) (detailing Court's growing reluctance to imply a cause of action into a federal statute). The focus of statutory interpretation has shifted away from a generalized study of the purpose or spirit of an Act to a progressively sharper inquiry into congressional intent through an Act's language, structure, and legislative history. *See Touche Ross*, 442 U.S. at 578 ("[G]eneralized references to the 'remedial purposes' of the [statute] will not justify reading a provision more

broadly than its language and statutory scheme reasonably permit."). A contemporary interpretation of the ADEA must follow the same framework. *See Sandoval*, 121 S. Ct. at 1520 (rejecting argument that statutes enacted prior to *Cort* should be interpreted within their own contemporary legal context). The precedential value of *Griggs* in such an analysis must take into account not only the differences in context between race and age discrimination, discussed above, but also *Griggs*' emphasis on the "objective" and "thrust" of Title VII rather than on its text to determine congressional intent. *Griggs*, 401 U.S. at 429 ("objective" of Congress in enacting Title VII); *id.* at 432 ("thrust" of the Act directed to the consequences of employment actions)[7/]

II. Congress Intended The ADEA To Proscribe Only Age-Motivated Discriminatory Conduct.

A. The Language Of Section 623(a) Proscribes Only Disparate Treatment.

The language of Section 623(a)(2) of the ADEA gives proof of what *Hazen Paper* implied: Age-motivation is a required element of a cause of action under the Act. The Section reads as follows:

> It shall be unlawful for an employer…to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.

29 U.S.C. § 623(a)(2). Section 623(a)(2) prohibits conduct taken "because of" such individual's age, which means "on account of" or "by reason of" age. *American Heritage Dictionary of the English Language* 159 (4th ed. 2000). This language requires a showing of age-motivation. D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis On Motive Rather Than Intent*, 60 S. Cal. L. Rev. 733, 739, 751 (1987) [hereinafter "Welch, *Removing Barriers*"] (the phrase "because of" reflects motive); *see also Ellis*, 73 F.3d at 1007 (most obvious reading of "because of such individual's age" is that it prohibits an employer from intentionally discriminating). Age-motivation is the linchpin of disparate treatment claims;[8/] disparate impact cannot be used as a surrogate.[9/] Consequently, Section 623(a)(2) can be reasonably read only to proscribe disparate treatment.

Although Petitioner argues that, "by prohibiting practices that 'adversely affect' older employees, the ADEA prohibits decisions having an 'adverse impact' on older employees," Pet. 18, that is not what the statute says.[10/]

7/ *See also Ellis*, 73 F.3d at 1007 n.13 (*Griggs* was not based on Title VII's text, but looked primarily to its larger objectives); Douglas C. Herbert & Lani Schweiker Shelton, *A Pragmatic Argument Against Applying The Disparate Impact Doctrine In Age Discrimination Cases*, 37 S. Tex. L. Rev. 625, 629 n.18 (1996) [hereinafter "Herbert & Shelton, *A Pragmatic Argument*"] (*Griggs* has often been characterized as judicial legislation).

8/ *Hazen Paper*, 507 U.S. at 610-11 (liability in a disparate treatment case, depends on whether the protected trait actually motivated the employer's decision); *Mullin*, 164 F.3d at 699 (linchpin of disparate treatment claim is proof of discriminatory motive).

9/ *Hazen Paper*, 507 U.S. at 608 ("Proof of discriminatory motive is not required under a disparate-impact theory.").

10/ If Congress had intended to write a provision like the one hypothesized by Petitioner, it could have used language from the provision governing federal-sector employees, which has been interpreted to proscribe both disparate impact and disparate treatment. 29 U.S.C. § 633a(a) ("All personnel actions affecting employees or

Rather, Section 623(a)(2) prohibits conduct taken "because of" such individual's age. In an attempt to force disparate impact into the meaning of the words, Petitioner argues that Section 623(a)(2)'s use of the phrase "because of" "reflects a cause and effect relationship that can subsume both intentional and unintentional conduct." *See* Pet. 26 & n.26.[11] The critical point, however, is that Section 623(a)(2) prohibits employment decisions that are "caused" by age, Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 739; ("Motive is a causal concept."); *American Heritage Dictionary of the English Language* 1147-48 (4th ed. 2000) ("motive" is a cause of motion), not simply employment decisions that "cause" harm to older employees. Petitioner's undefined distinctions between the concepts of "intent" and "consciousness" only confuse the real issue of "motive," which is the pivotal distinction between disparate treatment and disparate impact claims.[12/] Because liability for disparate

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applicants for employment who are at least 40 years of age...shall be made free from any discrimination based on age"); *see Lumpkin v. Brown*, 898 F. Supp. 1263 (N.D. Ill. 1995) (differences between Sections 623 and 633a suggest that disparate impact remains available under the latter even after *Hazen Paper*).

11/ It is notable that Section 623(a)(2) uses the exact same phrase (*i.e.*, "because of") and syntax as subsection (a)(1), and the latter proscribes only disparate treatment. *See Wards Cove Packing Co., Inc.*, 490 U.S. 642, 666-67 (1989) (Blackmun, J., dissenting). Therefore, according to Petitioner's own reasoning, "because of" in subsection (a)(2) also proscribes only disparate treatment. *See* Pet. 26 ("*identical* words used in close proximity should be construed to have the same meaning"); *see also Ellis*, 73 F.3d at 1007 n.12 (because Section 623(a)(1) and (a)(2) conclude with the same phrase, both are limited to intentional discrimination).

12/ Although the phrase "intent to discriminate" often has been used in ADEA and Title VII cases, it is a term of art that the Court always has defined in the employment context to mean "motivated"

impact will attach without a showing of age-motivation, the claim is not cognizable under the language of the ADEA.

Petitioner further argues that the key prepositional phrase "because of such individual's age" modifies the verb "affect," rather than "shall be unlawful...to limit, segregate, or classify." Pet. 20. The comma between the word "affect" and "because of," however, indicates that the latter is not dependent on and does not modify "affect," because a comma typically is not used after an adverbial dependent clause. *Instant English Handbook* 276 (1993 ed.). Instead, the comma signals that the phrase "because of" is out if its natural order. *Id.* at 281; *see also* Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843 n.27 (grammatical construction of Section 623(a)(2) should be interpreted to allow only disparate treatment); *DiBiase*, 48 F.3d at 733-34 (relying on Krop's grammatical analysis). Thus, like every other phrase in the Section, the phrase "because of such individual's age," should be read to modify the verbal phrase "to limit, segregate, or classify." This construction requires a showing of age-motivation, and authorizes only claims of disparate treatment. Krop, *Age Discrimination*, 34 Stan. L. Rev. at 843.

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by a protected trait. *See McDonnell Douglas*, 411 U.S. at 802 (emphasizing the employer's reason and the question of "racial motivation"); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (using term "intentional discrimination" but focusing on employer's "reasons"); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) (using term "intentional discrimination" but focusing on motive); *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352 (1995) (focusing solely on "motive"); *see also* Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 766-72 (despite courts' use of the term "intent," the ultimate issue in disparate treatment is motivation).

B. Section 623(f)(1) Does Not Support Creation Of A Disparate Impact Claim.

An analysis of the interaction between the prohibitory language in Section 623(a) with the exception language in Section 623(f)(1) does not support the creation of a disparate impact claim, Pet. 22-27, but confirms that the ADEA proscribes only disparate treatment. Section 623(f)(1)'s "reasonable factors other than age" (RFOA) clause reads:

> It shall not be unlawful for an employer …to take any action otherwise prohibited [where] … the differentiation is based on reasonable factors other than age.

By its plain language, age "differentiation" is lawful if it is based on factors other than age. Accordingly, decisions based on non-age factors that have a disparate impact on older workers are not unlawful under the RFOA clause. *See Mullin*, 164 F.3d at 700-01 (RFOA clause eliminates disparate impact claims); *DiBase*, 48 F.3d at 734 (RFOA clause indicates that neutral employment policies that are not improperly motivated may be permissible).

Petitioner—faced with the fact that Section 623(a)(2), by its own terms, does not authorize a disparate impact claim—attempts to overcome this hurdle by arguing that, for two related reasons, a disparate impact claim can be inferred into Section 623(a) when read in conjunction with the RFOA clause. First, she argues that the different causal terms in the two Sections—"*because of* such individual's age" in Section 623(a)(2) and "*based on* reasonable factors other than age" in Section 623(f)(1)—indicate that Congress intended some difference in meaning, which must be to proscribe "unintentional" discriminatory effects in 623(a)(2) and to excuse those effects in 623(f)(1) so long as an employer "intentionally" acts on non-age factors. Pet. 23-27. She further argues that the RFOA "affirmative defense" would be

superfluous if Section 623(a) proscribed only disparate treatment because "satisfaction of the premise for triggering the defense (the occurrence of a prohibited action) would inherently defeat the defense's application." Pet. 25. She concludes that "unintentional" conduct is proscribed by Section 623(a), while Section 623(f)(1) is available as a defense to liability. This argument has numerous flaws and, in any event, does not support the importation of a disparate impact claim into Section 623(a).

First, Petitioner's starting premise is incorrect: The RFOA clause is not an affirmative defense. It is a definitional provision underscoring what "shall not be unlawful" discrimination under Section 623(a). *Marshall v. Westinghouse Elec. Corp.*, 576 F.2d 588, 591 (5th Cir. 1988) (RFOA clause is not an affirmative defense; it is a denial of the plaintiff's prima facie case).[13/] The ADEA's legislative history confirms this interpretation. *E.g.*, 113 Cong. Rec. 1377 (1967) (statements of Secretary of Labor) ("The legislation would clearly indicate that the prohibitions are designed to bar arbitrary age discrimination. Reasonable differentiations not based solely on age…would not fall within the proscription.").

Extrapolating from the Older Workers Benefit Protection Act of 1990 (OWBPA), however, *amicus curiae* contends that the RFOA must be an affirmative defense. Br.

13/ *Cf. Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 82 (1977) (Title VII's Section 703(h) seniority provision is "a definitional provision" that "delineates which employment practices are illegal and which are not"); *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 243-53 (1979) (Rehnquist, J., dissenting) (Title VII's Section 703(j) was included to "define[] and clarif[y] the scope of Title VII's substantive provisions" and was proposed to eliminate opposition to the bill).

of Nat'l Employment Lawyers Ass'n (NELA) at 10-14. This argument falls short of its goal. The OWBPA amended the ADEA by expressly placing the burden of proof on the employer to prove the bona fide seniority system and the bona fide employee benefit plan exceptions in Section 623(f)(2). *See* Pub. L. No. 101- 433, § 103, 101 Stat. 978. The OWBPA's amendments were specifically designed to annul the Court's interpretation of the ADEA in *Public Employees Retirement Systems v. Betts*, 492 U.S. 158 (1989). There, the Court held that an employee challenging the validity of a facially age-based employee benefits plan under the ADEA bears the burden of proving that the employer had adopted the plan as a subterfuge for intentional age discrimination. *Id.* at 181. Although Congress altered *Betts*' outcome in the OWBPA, the revision cannot be viewed as "correcting" the Court's reasoning. *See* NELA at 13. This Court has the constitutional responsibility for *interpreting* Congressional statutes. The 1990 Congress in the OWBPA changed the burden that previously existed under the ADEA.

However the OWBPA modified the burden under Section 623(f)(2), it made no changes to the RFOA clause. In fact, although both the Senate and House bills proposed to revise Section 623(f)(1) to expressly allocate the burden of proof to the employer,[14/] this provision was deleted from the final bill that ultimately became the OWBPA.[15/] Given this history, NELA's reading of the OWBPA to infer that the

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14/ *See* H.R. Rep. 101-664, at 3, 46-47 (1990) (BFOQ exception in section 4(f)(1) is an affirmative defense for which the employer bears the burden of proof); S. Rep. No. 101-263, at 2, 29-30 (1990) (employer bears burden to plead and prove defenses in section 4(f)).

15/ *See* 136 Cong. Rec. 13,596-97 (1990) ("not disturbing or in any way affecting the allocation of the burden of proof for paragraph 4(f)(1) under pre-*Betts* law").

RFOA clause is an affirmative defense is simply without foundation. This is especially true since, unlike Section 623(f)(2), the RFOA clause does not specifically address facially age-based policies.

Moreover, *amicus curiae* and Petitioner make too much of the "affirmative defense" issue. Even if the RFOA is an affirmative defense and Petitioner is correct in her assertion that Section 623(a)(2) includes a proscription of unintentional conduct, the recognition of a disparate impact claim would not necessarily follow. Age-motivated conduct may be "unintentionally" discriminatory. Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 736-40 (motive is the reason for action; intent is the purpose that is being pursued—the goals one has in mind as choices are being made). In other words, conduct may be "age-motivated" even where, as is typically the case, the employer's conscious goal or "intent" is *not* to rid the workplace of older workers. Therefore, construing Section 623(a)(2) to prohibit unintentional conduct does not lead to an inference that disparate impact is an available theory of liability. Disparate treatment theory encompasses "unintentional," age-motivated conduct.

Petitioner dismisses this more natural reading of Section 623(a)'s "because of" language to allow only disparate treatment claims because "there is no reason to believe" that Congress intended to permit employment actions that were "*consciously* age-based, other than those clearly set forth in the ADEA." Pet. 24 n.13 (emphasis in original). Petitioner again confuses "intent" with disparate treatment's actual requirement of "motive." The issue here is whether ADEA liability can attach without a showing of age-motivation. Motives can be either conscious or unconscious, and the issue of whether disparate treatment claims are limited to *consciously* age-motivated conduct need not be

decided here. Welch, *Removing Barriers*, 60 S. Cal. L. Rev. at 736 (motive can be conscious or unconscious).

Accordingly, whether or not the RFOA clause is viewed as an affirmative defense, "motive" is the key inquiry under Section 623(a). Thus, the RFOA clause's use of the term "reasonable" cannot be read to require a showing of "business necessity," which forces an employer to justify its practice without respect to motive. The term "reasonable" merely reflects the ADEA's recognition that stereotypical assumptions about older workers' ability to do the job may be true in individual cases. In this context, the term "reasonable factors" is in contradistinction to the word "assumed."[16/] "Reasonable" means rational and in accordance with reason or sound thinking. *American Heritage Dictionary of the English Language* 1457 (4th ed. 2000). Contrary to Petitioner's argument, the RFOA is not superfluous under this analysis: The RFOA's function is to differentiate between age stereotyping and employment decisions reasonably based on facts in an individual case. A

16/ *See EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983) (reasonable factor is one "not directly dependent on age"); 113 Cong. Rec. 31,254 (1967) (remarks of Sen. Yarborough) ("a great deal of the problem stems from pure ignorance: there is simply a widespread irrational belief" about the capabilities of older workers); *Senate Hearings* at 39 (statement of Secretary of Labor) ("[This bill] does not prohibit or apply in any way to differentiations or distinctions being made on the basis of age so far as there is a legitimate relevance between age and employment capacity. The 'discrimination' it is directed against is the 'unjust' or 'arbitrary' distinction (which is what 'discrimination' is normally taken to mean) which may be made in the absence of any legitimate relevance between age and employment capacity."); Labor Report at 22 (in instances of alleged arbitrary discrimination where the facts indicate that older worker needs reeducation, training, counseling, or health and other services, the individual should be referred to appropriate programs for assistance).

decision may prove "reasonable" even if the employer "consciously" contemplates age. Thus, even on its own terms, Petitioner's contention that there is no reason to believe that Congress intended to permit employment actions that were "consciously age-based" simply is not true.

For example, an employer could discharge an older worker for poor attendance due to chronic health problems, which problems were caused by age. If the company decision maker were asked at the time of the discharge what was in her mind, she might say, "I am firing the employee because his age has affected his health, and I can't rely on him anymore." Even though, in this example, the employer consciously believes that the employee's poor health is because of his age, the employer can lawfully discharge the employee based on the attendance policy, even if that policy has a disparate impact on a group of older workers. If, however, the employer had simply assumed that the older employee was unreliable because of likely health problems related to age, and did not bother to test the assumption in that individual case, the discharge would be *solely* because of age and, therefore, unlawful.[17/] The flexible burden-shifting framework to examine motive (conscious or unconscious), which was established in *McDonnell Douglas* and clarified in

17/ *See* 113 Cong. Rec. 1,377 (1967) (statements of Secretary of Labor) (reasonable differentiations not based *solely* on age would not fall within the proscription of the proposed ADEA); 113 Cong. Rec. 31,255 (1967) (remarks of Sen. Javits) (question under ADEA as to whether the Act was violated is: "Was the individual discriminated against *solely* because of age?"); Labor Report at 11 (it would not be reasonable to exclude all older workers from consideration for certain jobs because *as a group* they are more subject to health problems associated with growing older, but it does mean that when older workers are considered on their merits, a certain proportion of them fail to qualify) (emphasis in original).

Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 120 S. Ct. 2097 (2000), is well-suited to this inquiry, unlike the overly broad and burdensome "business necessity" affirmative defense.

Even if, as in the example, the employer contemplates the employee's age or relies on a factor known to be correlated with age, the problem of inaccurate age stereotypes disappears if the employer's consideration of the individual's performance is the basis of the adverse decision. *See Hazen Paper*, 507 U.S. at 611 ("When the employer's decision is wholly motivated by factors other than age," as in disparate impact, "the problem of inaccurate and stigmatizing stereotypes disappears."). Consequently, under the ADEA, an employer is not required to prove the business necessity of permitting only a certain number of excused absences under its attendance policy, even if the policy has a disparate impact on older workers. The employer's reliance on a factor that correlates with age would be unlawful only if the employer was not only aware of the correlation, but acted because of it. *Hazen Paper*, 507 U.S. at 612-13 (targeting pension status may constitute age discrimination if employer supposes a correlation between the two factors and acts accordingly); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (disparate treatment requires showing that the employer selected a course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group). Since age stereotyping cannot be inferred simply from an empirical correlation with a non-age factor, the disparate impact theory is inapplicable.

Petitioner's only textual argument to suggest that Congress intended all "consciously age-based" decisions to be unlawful also fails. Petitioner argues that, if Congress had intended to allow an employer to consciously contemplate age without violating the Act, it would have said in Section

623(f)(1) something akin to "in addition to age," "besides age," "regardless of age," *etc.*, rather than "other than age." Pet. 24 & n.13. However, the definition of "other than" includes the term "besides," *see American Heritage Dictionary of the English Language* 1246 (4th ed. 2000), which Petitioner herself agrees answers her argument. Further, having already indicated that "otherwise prohibited" age discrimination is at issue, it is not surprising that Congress saw no need to say "in addition to age."

Petitioner's further observation that Section 623(f)(1)'s BFOQ clause expressly allows an employer to consider age under certain conditions does not support her negative inference that the RFOA clause entirely excludes conscious consideration of age. Pet. 24 n.13. The text does not require this interpretation, and the legislative history indicates that a BFOQ is simply a more specific example of an RFOA. *See* 113 Cong. Rec. 1,377 (1967) (statement of Secretary of Labor) ("Reasonable differentiations not based solely on age, including but not limited to bona fide occupational qualifications which may be reasonably necessary to the normal operation of a particular business, would not fall within the proscription."). Both clauses endorse the reading that an employer may consider age without it being unlawful, so long as the decision is not based solely on age. In light of the above, the only reasonable reading of Section 623 is one that limits the claim to situations of disparate treatment.

It also is highly plausible—and fully consistent with the above analysis—to infer that Congress included Section 623(f)(1) to preempt courts from importing into the ADEA a contemporary interpretation of "intent to discriminate" in the labor context. *See Alexander*, 121 S. Ct. at 1520 ("legal context matters...to the extent it clarifies text"). At the time of the ADEA's enactment, the Court, interpreting Section

8(a) of the National Labor Relations Act, had replaced the concepts of "intent to discriminate" and "motivation" with a test for "foreseeable consequences." *E.g., NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 230 n.8 (1963) (rejecting the employer's argument "that conduct otherwise unlawful is automatically excused upon a showing that it was motivated by business exigencies"); *see also Note, Discrimination And The NLRB: The Scope Of Board Power Under Sections 8(a)(3) And 8(b)(2)*, 32 U. Chi. L. Rev. 124, 128 (1964) (Court blurred distinction between intent and motive). Such a test would be particularly inappropriate under the ADEA, where an employer may very well foresee a disparate statistical impact on older workers simply because it relies on a legitimate factor, such as seniority, which is empirically correlated with age. Since this does not entail "arbitrary discrimination," Congress may have deemed it necessary to include Section 623(f)(1) to ensure that age-motivation (rather than some variation of "intent") retained a central role in ADEA cases.

C. The Civil Rights Act Of 1991.

If any ambiguity remains on the point, the ADEA's more recent legislative history also demonstrates Congress' intent to provide for disparate impact claims under Title VII but not under the ADEA. The Civil Rights Act of 1991 ("CRA 1991") amended Title VII in a few relevant respects. Most notably, Congress explicitly added a disparate impact cause of action to Title VII, and expressly chose not to permit jury trials in such cases. *See* Pub. L. No. 102-166, § 105, 105 Stat. 1071, 1074-75 (1991). Even though Congress amended the ADEA in other respects,[18/] it added no such parallel

18/ The CRA 1991 amended the ADEA or expressly referenced the ADEA several times. *See* The CRA 1991, §115 (amending 29 U.S.C. § 626 (e) to strike a paragraph and to add a paragraph to

provision to the ADEA, "thus signaling its intent not to provide for a disparate impact cause of action under the ADEA." *Ellis*, 73 F.3d at 1008.

Further, Congress' decision not to allow jury trials in Title VII disparate impact cases suggests that it would be inappropriate to allow disparate impact cases under the ADEA, where there is a right to a jury trial. Herbert & Shelton, *A Pragmatic Argument*, 37 S. Tex. L. Rev. at 626 (no jury trials in Title VII disparate impact cases likely due to complexity of statistical issues; such issues are even more complex in age cases where jury trials are permitted, which suggests that disparate impact should not apply).

The CRA 1991 also amended Title VII to respond to the "mixed motive" analysis adopted in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), a gender stereotyping case. *See* 42 U.S.C. § 2000e-5(g)(2)(b) and § 2000e-2(m). Under 42 U.S.C. § 2000e-2(m), if the plaintiff proves that an identified protected trait was "a motivating factor," a violation is established "even though other factors also motivated the practice." Once a Title VII plaintiff proves a violation of § 2000e-2(m), she is entitled to certain limited relief under § 2000e-5(g)(2)(b), even if the employer demonstrates that it would have taken the same action in the absence of the impermissible motivating factor. 42 U.S.C. § 2000e-5(g)(2)(b). Congress did not similarly amend the ADEA. *See Lewis v. Young Men's Christian Ass'n*, 208 F.3d 1303, 1305 (11th Cir. 2000) (Section 2000e-5(g)(2)(B) did not amend the ADEA and therefore is inapplicable to ADEA

proscribe the time for filing lawsuit after EEOC's issuance of a notice of right to sue); §§ 301-302 (creating the "Government Employee Rights Act of 1991," including provision to require that all personnel actions affecting Senate employees be made free from discrimination based on age, within the meaning of section 15 of the ADEA).

claim). Therefore, unlike under Title VII, a plaintiff will not prevail under the ADEA merely by showing that age played *a* motivating role. *Cf. Hazen Paper*, 507 U.S. at 609 (disparate treatment claim cannot succeed unless protected trait played a role *and* had a determinative influence on the outcome). This amendment provides an additional reason to believe that the ADEA allows employment decisions made because of age under Section 623(a), and even if made "consciously" because of age, so long as the employer also was motivated by non-age factors under Section 623(f)(1).

To counter the implications of the CRA 1991, *amicus curiae* seeks to infer disparate impact into the ADEA from other recent legislation. *See* The Academy of Florida Trial Lawyers (AFTL) at 14-20. AFTL argues that, because the OWBPA requires employers to provide statistics to the employees who are considering whether to waive their ADEA rights, Congress must have assumed the availability of disparate impact under the ADEA. AFTL itself concedes, however, that statistics are relevant to disparate treatment age discrimination cases. AFTL at 14.[19/]

In sum, Petitioner's and *amici*'s analysis of the ADEA to require an inference of a disparate impact claim in Section 623(a) does not withstand scrutiny. The only reasonable interpretation of the interplay between Sections 623(a) and 623(f)(1) is that Congress proscribed only age-motivated conduct in the former. The latter clarified that

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19/ *See also McDonnell Douglas*, 411 U.S. at 805 (statistics "may be helpful" in an individual disparate treatment case); *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (statistics are relevant to proof of a pattern and practice of disparate treatment); 1 Barbara Lindeman & Paul Grossman, *Employment Discrimination Law* Ch. 16, p. 595 (3d ed. 1996) (statistical evidence may be used in a disparate treatment age discrimination case).

decisions, even if caused by age, are not unlawful if also based on factors other than age. Because motive plays an indispensable role under the ADEA, the disparate impact theory is not available.

D. The EEOC's Interpretive Guidelines Cannot Create A Disparate Impact Claim.

Although 29 C.F.R. § 1625.7(d) seeks to transplant disparate impact into the ADEA context and to interpret the RFOA clause to mean "business necessity," Pet. 36-37, it is only an EEOC policy guideline. *See* 46 Fed. Reg. 47,724 (1981) (ADEA guidelines are only statements of EEOC policy and do not comply with legal requirements for rulemaking).[20/] The force of such guidelines is a function of their persuasive value. *Christensen v. Harris County*, 529 U.S. 576, 586 (2000); *United States v. Mead Corp.*, 121 S. Ct. 2164, 2175 (2001) (no *Chevron*-deference to guidelines).

The latest administrative interpretation of the ADEA relating to disparate impact theory is not persuasive. First, the interpretation has been inconsistent. Herbert & Shelton, *A Pragmatic Argument*, 37 S. Tex. L. Rev. at 642-43. Until 1978, the Department of Labor (DOL) was responsible for the enforcement and administration of the ADEA. *See id.* The DOL interpreted the ADEA to require that any "differentiation" be "reasonable," which would be "determined on an individual, case by case basis, not on the basis of any general or class concept." 29 § 860.103(d) (1969). The DOL obviously did not contemplate disparate impact cases, which, by their nature and as alleged here, are class actions in which statistical correlation, "business

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20/ Because the EEOC did not, in fact, use its delegated rule-making authority under the ADEA, *amicus curiae* is wrong to suggest the guidelines are "binding." *See* AFTL at 7.

necessity" and "job-relatedness" are considered relative to the class. *See Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 409 (5th Cir. 1998). Further, in 1978, the ADEA was specifically exempted from the Uniform Guidelines on Employee Selection Procedures, which was a key disparate impact policy addressing the validation of tests and other selection procedures. 29 U.S.C. § 1607.2. It was not until 1981 that the EEOC issued its guidelines stating that the disparate impact theory is viable under the ADEA. *See* 46 Fed. Reg. 47,727 (1981). This inconsistent regulatory history militates against deference. *EEOC v. Arabian Amer. Oil Co.*, 499 U.S. 244, 257-58 (1991) (Title VII) (level of deference afforded EEOC guidelines will depend on thoroughness of its consideration, validity of reasoning, and consistency with other pronouncements).

Further, the EEOC's disparate impact guideline is the product of a flawed analysis. Rather than evaluating the ADEA's language or legislative history, the EEOC simply re-wrote the DOL's prior version of the Section to "make it clear" that disparate impact applied in ADEA cases. 46 Fed. Reg. 47,725 (1981). The EEOC cited only two bases of authority for the revision: *Laugesen v. Anaconda Corp.*, 510 F.2d 307 (6th Cir. 1975) and *Griggs*. In *Laugesen*, a single plaintiff disparate treatment case, the court opined that then-DOL regulation 29 C.F.R. § 860.103 was aimed at policies affecting a group of older employees. It cited *Griggs*. The court merely interpreted the DOL's regulation, however, without offering an opinion on whether it was consistent with the ADEA. The court also expressly noted the unsoundness of simply transplanting Title VII concepts into the ADEA. *Laugesen*, 510 F.2d at 312. Further, as discussed above, *Griggs* did not rely on the text of Title VII, let alone the ADEA. Consequently, neither case forms a sound basis for the EEOC's regulation.

Most importantly, for the reasons discussed at length above, the ADEA can be reasonably read to proscribe only disparate treatment. Neither its language nor history permit an inference of a disparate impact claim. Consequently, the EEOC's decision to discard age-motivation in 29 C.F.R. § 1625.7(d) is inconsistent with the ADEA's language, and warrants no deference. *Betts*, 492 U.S. at 171 ("[N]o deference is due to agency interpretations at odds with the plain language of the statute itself.")[21/] The fact that the guideline has survived for decades, Pet. 37, endows it with no greater authority. *Id.* ("Even contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language.").

Finally, even if congressional inaction to reverse an agency guideline deserves the weight Petitioner ascribes it, Pet. 27, the viability of disparate impact theory under the ADEA was called into question as early as 1981, *see Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of *certiorari*) and was patently challenged in 1993 in *Hazen Paper*. Still, despite numerous amendments to the ADEA, Congress did not create a disparate impact cause of action as under Title VII. Thus, neither as originally enacted nor as amended does the ADEA create a disparate impact claim. Therefore, no such claim exists.

21/ *See Alexander*, 121 S. Ct. at 1517 (Civil Rights Act of 1964, Title VI) (regulation proscribing disparate impact is in "considerable tension" with a statute forbidding only intentional discrimination); *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 613 (1983) (O'Connor, J., concurring) (agency regulations that proscribe conduct having only a discriminatory effect do not further the purpose of a statute proscribing only purposeful conduct; they go well beyond it).

CONCLUSION

The Court's reasoning in *Hazen Paper* compels the conclusion that age-motivation is an essential element of a cause of action for age discrimination. The ADEA's language, structure, and legislative history demonstrate that requiring employers to show the business necessity of decisions based on reasonable factors other than age that may statistically impact older workers is contrary to congressional intent.

For the foregoing reasons, the judgment below should be affirmed.

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 01-584

IN THE

Supreme Court of the United States

WANDA ADAMS, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

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February 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE COURT OF APPEALS CORRECTLY RULED AS A MATTER OF LAW THAT THE DISPARATE IMPACT THEORY OF DISCRIMINATION IS UNAVAILABLE UNDER THE ADEA	7
A. The Unanimous Supreme Court's Categorical Declaration in *Hazen Paper* That Disparate Treatment "Captures the Essence of What Congress Sought To Prohibit in the ADEA" Cannot Be Reconciled With a Rule Permitting Disparate Impact Claims Under That Statute	7
B. This Court's Holding in *County of Washington v. Gunther* Stands for the Proposition That Disparate Impact Claims Are Impermissible Where a Decision Based on Factors Other Than Protected Class Membership Is Expressly Permitted by Statute	9
C. The Plain Language and Legislative History of the ADEA Confirm Congress' Clear Intent To Preclude Disparate Impact Claims	12

TABLE OF CONTENTS—Continued

	Page
1. The Secretary of Labor in his report to Congress recommended that unintentional age discrimination be addressed in "alternative ways"	12
2. The ADEA was designed to prohibit "arbitrary" age discrimination	14
3. Congress chose not to amend the ADEA post-*Griggs* to permit disparate impact claims	15
II. A DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES	17
A. Monitoring the Impact of Selection Decisions by Age Is Impracticable, and Would Not Yield Meaningful Data	17
1. Age is an inherently mutable personal characteristic	17
2. Achieving statistical parity by age is impossible	17
B. Unlike Other Protected Characteristics, Age Often Is Correlated With Legitimate Criteria Used by Employers as a Means of Differentiating Between Employees	19
CONCLUSION	21

TABLE OF AUTHORITIES

FEDERAL CASES	Page
County of Washington v. Gunther, 452 U.S. 161 (1981)	4, 9, 10, 11
Criley v. Delta Air Lines, Inc., 119 F.3d 102 (2d Cir. 1997)	9, 18
EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984)	2
EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999)	2, 9, 18
EEOC v. Wyoming, 460 U.S. 226 (1983)	11, 12, 13
Ellis v. United Airlines, Inc., 73 F.3d 999 (10th Cir. 1996)	11, 20
Finnegan v. Trans World Airlines, Inc., 967 F.2d 1161 (7th Cir. 1992)	20
Frank v. United Airlines, Inc., 216 F.3d 845 (9th Cir. 2000), *cert. denied*, 532 U.S. 914 (2001)	2, 9
Griggs v. Duke Power Co., 401 U.S. 424 (1971)	10, 15
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993)	*passim*
Hiatt v. Union Pac. R.R. Co., 65 F.3d 838 (5th Cir. 1995)	2
Markham v. Geller, 451 U.S. 945 (1981)	12
Mullin v. Raytheon Co., 164 F.3d 696 (1st Cir. 1999)	11, 16
O'Connor v. Consolidated Coin Caterers Corp., 517 U.S. 308 (1996)	19
Public Employees Ret. Sys. v. Betts, 492 U.S. 158 (1989)	2
Shell Oil v. Dartt, 434 U.S. 600 (1977)	2
Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989)	15

TABLE OF AUTHORITIES—Continued

STATUTES

Page

Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* 2, 3, 4
29 U.S.C. § 621(a)(2) 14
29 U.S.C. § 621(a)(4) 14
29 U.S.C. § 621(b) 6, 15
29 U.S.C. § 623(a) 4, 11
29 U.S.C. § 623(f)(1) 4, 11
29 U.S.C. § 626(e) 16
Energy Policy Act of 1992, 106 Stat. 2776 3
Equal Pay Act, 29 U.S.C. § 206(d) 4
29 U.S.C. § 206(d)(1) 4, 9, 10
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* 5
42 U.S.C. § 2000e-2(k)(1)(A)(i) 16

MISCELLANEOUS

Employment Policy Foundation Tabulation of Census/BLS Current Population Survey (Dec. 2001) 17
Miles F. Archer, *Case Note, Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149 (2000) 20
Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* (Shepard's/McGraw-Hill, Inc. 1998 & Supp. 2001) 18

TABLE OF AUTHORITIES—Continued

Page

U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment,* Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor, 89th Cong., 1st Sess. 201-29 (1965) 5, 12, 13, 14

IN THE

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Respondents Florida Power Corporation, *et al.*[1] The written consent of all parties has been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of discriminatory employment practices. Its membership comprises a

[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of the brief.

broad segment of the business community and includes over 340 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and requirements. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. § 621 *et seq.*, as well as other equal employment statutes and regulations. As employers, and as potential respondents to employment discrimination claims, EEAC's members have a strong interest in the issue presented for the Court's consideration regarding whether the "disparate impact" theory of discrimination is available under the ADEA. Because of this interest, EEAC has filed *amicus curiae* briefs in cases addressing this issue before this Court and in several circuit courts of appeals.[2] EEAC also has participated in a number of other cases before this Court involving the ADEA.[3]

Thus, EEAC has an interest in, and a familiarity with, the issues and policy concerns presented to the Court in this case. Indeed, because of its experience in these matters, EEAC is well situated to brief the Court on the implications of the issues beyond the immediate concerns of the parties to the case.

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[2] *E.g.*, *Frank v. United Airlines, Inc.*, No. 00-948, *cert. denied*, 532 U.S. 914 (2001); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999); *Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984).

[3] *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil v. Dartt*, 434 U.S. 600 (1977) (per curiam).

STATEMENT OF THE CASE

Respondent Florida Power Corporation ("Florida Power") produces and distributes electricity throughout the State of Florida. Resp. Opp. Br. 2. In 1992, Congress enacted the Energy Policy Act of 1992, 106 Stat. 2776, which deregulated the energy industry and opened it to competition among and between utility companies. *Id.* In an effort to prepare for this change, Florida Power experienced several business reorganizations, which resulted in the elimination of over 1,200 positions. *Id.*

Petitioners, former employees of Florida Power, commenced an action in the U.S. District Court for the Middle District of Florida alleging that Florida Power terminated their employment in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* *Id.* Specifically, they alleged that as part of its company-wide reduction in force, Florida Power unlawfully targeted older workers for position elimination in favor of those employees under age 40. Resp. Opp. Br. App. 3a.

On November 30, 1995, Petitioners moved for class certification, *id.* at 4a, and on December 11, 1996, the district court conditionally certified the class. *Id.* at 6a. The class was defined to include "all former employees of Florida Power who were terminated from employment on or after July 1, 1993 as part of the redeployment or career transition programs and who were forty years of age or older at the time of their respective terminations." *Id.* The district court subsequently decertified the class, ruling that the disparate impact theory of discrimination is not available under the ADEA. Pet. App. 25a.

Petitioners appealed to the U.S. Court of Appeals for the Eleventh Circuit, which affirmed the district court's ruling. Pet. App. 1a.

SUMMARY OF ARGUMENT

The court below was correct in holding that a violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, may not be established using a "disparate impact" theory of employment discrimination. A contrary conclusion simply cannot be reconciled with this Court's ruling in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination.

While the Court in *Hazen Paper* did not decide the issue directly, Justice O'Connor, writing for a unanimous Court, categorically declared that "disparate treatment," as distinct from disparate impact, "captures the essence of what Congress sought to prohibit in the ADEA." *Id.* at 610.

This Court's ruling in *County of Washington v. Gunther*, 452 U.S. 161 (1981), further supports the principle that disparate impact actions are not available under the ADEA. In *Gunther*, the Court held that disparate impact claims of discrimination are unavailable under the Equal Pay Act (EPA), 29 U.S.C. § 206(d), which prohibits wage discrimination "on the basis of sex," but allows for differences in pay based on "any other factor other than sex." 29 U.S.C. § 206(d)(1).

Like the EPA, the ADEA prohibits employment discrimination "because of" an individual's age, 29 U.S.C. § 623(a), but permits differences that are based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Given the strong similarities between the texts of the EPA and the ADEA, this Court's rationale in *Gunther* should apply to preclude disparate impact claims brought under the ADEA.

Furthermore, the plain language, purpose and legislative history of the ADEA all point to the conclusion that Congress enacted the ADEA to prevent intentional, age-based employment discrimination, not employment decisions or

practices based on factors "analytically distinct" from age, even where such factors may be "correlated with age." *Hazen Paper,* 507 U.S. at 611.

The disparate impact theory originated as a judicially-conceived doctrine designed to address aspects of discrimination on the basis of race and other immutable characteristics, covered by Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e *et seq.,* that have no parallel in the context of age. Indeed, the Secretary of Labor's 1965 report to Congress on age discrimination, which provided the principal findings and recommendations upon which the ADEA was predicated, drew a fundamental distinction between "arbitrary discrimination" on the basis of age and "institutional arrangements that indirectly restrict the employment of older workers," and offered very different approaches to solving these two distinct types of problems.[4]

The report recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that "institutional arrangements that indirectly restrict the employment of older workers" be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement. *Id.*

This distinction was reiterated throughout the legislative deliberations on the ADEA and ultimately was embraced by Congress in the Act's very declaration of purposes. Thus, the ADEA states:

> It is . . . the purpose of this chapter to promote employment of older persons based on their ability rather than

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[4] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), reprinted in Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Educ. and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as 'Secretary's Report').

> age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). In short, unlike Title VII, the ADEA expressly addresses the issue of "impact" and adopts measures to deal with it other than through application of statutory prohibitions designed to address intentional discrimination.

Finally, a disparate impact analysis is fundamentally unsuitable for use in ADEA cases. Because age is a constantly evolving personal characteristic, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, and no employer could be certain of being in compliance for more than a day at a time.

Additionally, unlike other protected characteristics, age often is correlated to legitimate criteria such as seniority, salary and the like, which routinely are used by employers as a means of differentiating among employees. Were this Court to recognize disparate impact claims under the ADEA, employers would be limited in their ability, for instance, to manage business downturns through the use of layoffs or reductions in force.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY RULED AS A MATTER OF LAW THAT THE DISPARATE IMPACT THEORY OF DISCRIMINATION IS UNAVAILABLE UNDER THE ADEA

A. The Unanimous Supreme Court's Categorical Declaration in *Hazen Paper* That Disparate Treatment "Captures the Essence of What Congress Sought To Prohibit in the ADEA" Cannot Be Reconciled With a Rule Permitting Disparate Impact Claims Under That Statute

In its unanimous decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), this Court ruled that legitimate business decisions only indirectly correlated with age do not violate the ADEA under a disparate treatment theory of discrimination. The Court discussed the distinction between the "disparate treatment" and "disparate impact" theories of discrimination and noted pointedly, "we have never decided whether a disparate impact theory of liability is available under the ADEA." *Id.* at 610 (citing *Markham v. Geller*, 451 U.S. 945 (1981) (Rehnquist, J., dissenting from denial of certiorari)).

The Court proceeded to describe the elements of a disparate treatment cause of action and then declared categorically, "Disparate treatment, thus defined, captures the essence of what Congress sought to prohibit in the ADEA." *Hazen Paper,* 507 U.S. at 610-11.[5] The Court explained:

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[5] Lest a stronger cautionary note were needed to those who would assume that the disparate impact theory applies to the ADEA as well as to Title VII, three justices filed a concurring opinion in *Hazen Paper* emphasizing that "nothing in the Court's opinion should be read as incorporating in the ADEA context the so-called 'disparate impact' theory of Title VII" and that "there are substantial arguments that it is improper to carry over disparate impact analysis from Title VII to the ADEA." 507 U.S. at 618 (concurring opinion of Justice Kennedy, joined by the Chief Justice and Justice Thomas).

> Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes . . .
>
> * * *
>
> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is.

Id. Thus, while this Court characteristically limited its holding to the specific issue before it, 507 U.S. at 611-12, the language and rationale of *Hazen Paper* indicate strongly that, if presented with such a case, this Court would declare disparate impact claims unavailable as a matter of law under the ADEA.

The court below therefore properly relied on *Hazen Paper* to reach the logical conclusion that while disparate treatment claims are available under the ADEA, disparate impact claims are not.[6] Noting the split in opinion among federal appellate courts, the court below adopted the reasoning of the First, Third, Sixth, Seventh and Tenth Circuit Courts of Appeals, which either "have questioned the viability of disparate impact claims under the ADEA post-*Hazen,*" or

[6] *Amici* for Petitioners seek to blur the distinction between disparate impact and disparate treatment discrimination, arguing that stereotypes often form the basis for neutral policies and practices. In fact, even the unconscious use of stereotypes in employment decision-making connotes hidden cognitive bias *directly related* to a protected characteristic, and is not facially neutral. As such, reliance on stereotypes is characteristic-driven and therefore unsuitable for analysis under the disparate impact theory.

have ruled unequivocally that disparate impact discrimination claims are not cognizable under the ADEA. Pet. App. 5a (citations and footnote omitted).[7]

B. This Court's Holding in *County of Washington v. Gunther* Stands for the Proposition That Disparate Impact Claims Are Impermissible Where a Decision Based on Factors Other Than Protected Class Membership Is Expressly Permitted by Statute

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court held that the Bennett Amendment to Title VII, which prohibits sex-based wage discrimination claims where the pay differential in question is authorized by the Equal Pay Act, effectively incorporates into Title VII the Equal Pay Act's four affirmative defenses, including the defense for differentials based on "any other factor other than sex."[8] The

[7] In direct conflict with the Court's reasoning in *Hazen Paper*, the Ninth Circuit continues to rely on pre-*Hazen* precedent to unconditionally allow disparate impact causes of action under the ADEA. *Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000), *cert. denied,* 532 U.S. 914 (2001). While also generally recognizing disparate impact age discrimination claims, unlike the Ninth, the Second and Eighth Circuits have limited the circumstances under which such causes of action brought under the ADEA may proceed. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999).

In particular, neither circuit will allow a disparate impact action under the ADEA where the complained-of policy or practice disproportionately disadvantages only a sub-group of persons within the protected class. *Id.* Thus, if a challenged company policy is alleged to have a disparate impact only on workers who are 50-plus years old and not the entire class of individuals age 40 or more, the Second and Eighth Circuits have ruled that such a claim is outside the scope of ADEA coverage. *Id.*

[8] The EPA provides, in relevant part:

> No employer having employees subject to any of the provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees in such establishment at a rate

Court rejected the argument that the defense already was implicit in Title VII, and stated that the defense "could have significant consequences for Title VII litigation [involving alleged sex-based pay discrimination]." *Id.* In doing so, the Court intimated that the "factor other than sex" defense was inconsistent with the *Griggs* disparate impact doctrine, and suggested that the defense appeared to have been designed to limit the application of the Equal Pay Act to disparate treatment claims. *Id.*

Contrasting the EPA with Title VII, the Court in *Gunther* noted that Title VII was designed not only to prohibit "overt discrimination," but also to proscribe "practices that are fair in form, but discriminatory in operation." *Gunther* at 170 (citation omitted). The Court observed further:

> The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Id. (citation and footnote omitted). The Court concluded that unlike Title VII, the EPA was structured only to forbid intentional, sex-based discrimination. Thus, an employer that makes an employment decision based on some factor "other than" sex will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

> less than the rate at which he pays wages to employees of the opposite sex in such establishment . . . except where such payment is made pursuant to . . . a differential based on any other factor other than sex.

29 U.S.C. § 206(d)(1).

Like the EPA, the ADEA prohibits arbitrary employment discrimination "because of" an individual's age, 29 U.S.C. § 623(a), but permits differences that are based on "reasonable factors" other than age:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where . . . the differentiation is based on reasonable factors other than age . . .

29 U.S.C. § 623(f)(1). Thus, the ADEA provides a specific statutory exception to liability for discrimination—similar to that contained in the EPA—where the complained of conduct is based on a factor "other than" age. Indeed, this Court has pointed out that this provision was included in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. 226, 232-33 (1983). Moreover, the Court now has made clear that a neutral criterion cannot be deemed to be *dependent on* age simply because it is "*correlated with* age." *Hazen Paper*, 507 U.S. at 611 (emphasis added).

Several courts have relied on *Gunther* as further support for disallowing disparate impact claims under the ADEA. *Mullin v. Raytheon Co.*, 164 F.3d 696, 702 (1st Cir. 1999); *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1008 (10th Cir. 1996). In *Mullin v. Raytheon*, for instance, the First Circuit reasoned:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia,* as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Mullin, 164 F.3d at 702 (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other*

Title VII Issues, 49 L. & Contemp. Prob. 53, 55 (1986)). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'"). The First Circuit observed further, "[w]e hasten to add that since Title VII contains no comparable exception, this difference in the statutory schemes further distinguishes *Griggs*." 164 F.3d at 702 n.5.

In view of the clear parallel between the EPA and the ADEA regarding exceptions to liability for conduct based on factors "other than" a protected characteristic, the court below determined correctly that, as under the EPA, disparate impact claims of discrimination simply are not available under the ADEA.

C. The Plain Language and Legislative History of the ADEA Confirm Congress' Clear Intent To Preclude Disparate Impact Claims Under the Act

1. The Secretary of Labor in his report to Congress recommended that unintentional age discrimination be addressed in "alternative ways"

As this Court has recognized,[9] the passage of the ADEA was strongly influenced by the contents of a 1965 report by then Secretary of Labor Willard Wirtz [10] in accordance with a

[9] *See EEOC v. Wyoming*, 460 U.S. 226, 230 (1983).

[10] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as 'Secretary's Report').

directive incorporated in Title VII.[11] After conducting a study of the factors that tended to result in age discrimination in employment, Secretary Wirtz concluded:

> The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race. It means in connection with the age question, furthermore, several different things.[12]

The Secretary's Report went on to differentiate between what it termed "arbitrary discrimination" on the basis of age —*i.e.*, discrimination based on assumptions about people's ability resulting from age-based stereotypes—and problems resulting from factors that "affect older workers more strongly as a group than they do younger workers." [13] It recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that "institutional arrangements that indirectly restrict the employment of older workers" be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement.[14]

[11] Significantly, Congress decided to order the Secretary's Report, rather than simply include age among the categories of employment discrimination prohibited by Title VII, at least in part because members raised doubts that age discrimination presented the same types of problems as discrimination on the basis of race, color, religion, sex and national origin. *EEOC v. Wyoming*, 460 U.S. at 229.

[12] Secretary's Report at 5.

[13] *Id.* at 11. As examples of such factors, the report mentioned health differentials between younger and older workers, the lower educational attainment of older workers, changes in technology, possible lowerings of productivity, and a "range of institutional arrangements that indirectly restrict the employment of older workers." *Id.* at 15.

[14] *Id.* at 15.

Specifically, the report recommended that Congress take action to eliminate "arbitrary discrimination" by declaring and implementing "a national policy with respect to hiring on the basis of ability rather than age," backed up with provisions for "action" where necessary in "cases of alleged violations of [the] policy."[15] Significantly, however, the Secretary's Report did *not* recommend that Congress also outlaw those practices that "affect older workers more strongly as a group."[16] Rather, it recommended addressing these latter types of problems through programmatic measures to increase the availability of work for older workers and to enlarge educational opportunities for older workers.[17]

2. The ADEA was designed to prohibit "arbitrary" age discrimination

This same distinction ultimately was embodied in the ADEA's statement of findings. Section 2(a)(2) of the ADEA contains Congress' findings that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice," and that "certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). Yet, Section 2(a)(4) states only that "the existence in industries affecting commerce of *arbitrary discrimination* in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4) (emphasis added). Thus, it is only "arbitrary discrimination," and *not* "practices [that] may work to the disadvantage of older persons," that Congress found to burden interstate commerce. It therefore follows that Congress intended that the ADEA's prohibitions encompass solely arbitrary discrimination, which was equated through the Act's legislative history with intentional discrimination.

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[15] *Id.* at 22.

[16] *Id.* at 21-22.

[17] *Id.* at 23-24.

This conclusion draws further support from the ADEA's declaration of purpose. Section 2(b) of the Act, 29 U.S.C. § 621(b), states:

> It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Again, this declaration indicates that the ADEA was designed to prohibit only "arbitrary discrimination," while directing that "problems arising from the impact of age on employment" be addressed through other measures, just as the Secretary of Labor had recommended. Title VII, in contrast, contains no express indication that problems involving "impact" are to be dealt with differently than intentional discrimination.[18]

3. Congress chose not to amend the ADEA post-*Griggs* to permit disparate impact claims under the Act

Neither the language of the ADEA, nor the original Title VII language after which the ADEA's prohibitory provisions were patterned, contains any reference to disparate impact. Rather, the disparate impact theory of discrimination is a judicially created doctrine based on an interpretation of Congress' intent in enacting Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

In *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), this Court clarified and, some believed, significantly

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[18] The fact that Congress chose in 1967 to enact a new and entirely separate piece of legislation, rather than simply amending Title VII to add age to the list of protected characteristics, further demonstrates that Congress did not intend Title VII and the ADEA to prohibit the same forms of discrimination.

changed the burdens of proof applicable in disparate impact cases under Title VII. Congress reacted in the Civil Rights Act of 1991 by amending Title VII to spell out the parties' respective burdens of proof in cases involving an "employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(k)(1)(A)(i).

Significantly, the 1991 legislation made no mention of disparate impact on the basis of age, nor did it include any similar amendment to the ADEA to codify the disparate impact theory as a part of that law.[19] This omission is telling, particularly because the Civil Rights Act of 1991 *did* include amendments to other provisions of the ADEA.[20]

The implication of this history is that Congress consciously determined to exclude disparate impact claims under the ADEA. As the First Circuit observed, "Congress' insertion of an express provision for a disparate impact cause of action in Title VII renders the absence of such a provision in the ADEA—which was undergoing revision at the same time by the same committees and in the same bill—highly significant." *Mullin v. Raytheon Co.*, 164 F.3d 696, 704 (1st Cir. 1999) (citations omitted).

[19] Were this Court to determine that disparate impact claims are available under the ADEA, the *Wards Cove* burden of proof analysis would apply in such cases, since the 1991 Act pertains only to actions brought under Title VII.

[20] Section 115 of the Civil Rights Act of 1991 amended the ADEA to provide for the filing of civil actions by individuals within 90 days following receipt of notice from the EEOC of the dismissal of a charge or termination of the Commission's proceedings with respect thereto. 29 U.S.C. § 626(e).

II. A DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES

A. Monitoring the Impact of Selection Decisions by Age Is Impracticable, and Would Not Yield Meaningful Data

1. Age is an inherently mutable personal characteristic

Unlike the immutable characteristics covered by Title VII, age is a progressive condition that affects everyone, but affects individuals differently at different times. Most workers eventually attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age with the passage of time. Thus, for instance, the class of all ADEA-protected individuals changes each day. On average, 11,837 people will turn 40 every day in 2002.[21] Given the inherently mutable characteristics of age, it is impossible to associate a single business decision or event with any single, age-protected group.

2. Achieving statistical parity by age is impossible

Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. If this Court were to adopt a rule allowing disparate impact claims to be brought under the ADEA, prudence would dictate that employers also ought to monitor their selection decisions for age-based adverse impact. In practice, however, achieving statistical parity by age is an impossible task, since the age composition of any given group is constantly changing and never static from one day to the next.

[21] Employment Policy Foundation Tabulation of Census/BLS Current Population Survey (Dec. 2001) (microdata records public use file at www.bls.census.gov/cps/cpsmain.htm.)

Since age is a continuous, rather than dichotomous variable, it may be used to divide individuals into innumerable groupings for purposes of comparisons. As a result, the statistical comparisons on which disparate impact findings invariably depend may present serious problems in the age context, *see, e.g.,* Ramona L. Paetzold & Steven L. Willborn, *The Statistics of Discrimination* § 7.11 (Shepard's/McGraw-Hill, Inc. 1998 & Supp. 2001), and efforts to correct for such problems through the use of statistical techniques such as "age-break analysis" (*i.e.* comparisons based on selected age sub-groupings) are prone to yield unreliable and even "paradoxical" results. *Id.* at § 7.03. As the Second and Eighth Circuits have concluded, comparing age sub-groups simply does not work. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951 (8th Cir. 1999). In *EEOC v. McDonnell Douglas*, 191 F.3d 948 (8th Cir. 1999), for instance, the Eighth Circuit reasoned:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an [sic] RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

Id. at 951 (citations omitted).

The Eighth Circuit's rationale in *McDonnell Douglas*, while addressing specifically age sub-group claims, illustrates just one of the practical difficulties associated with applying a disparate impact theory of discrimination under the ADEA. Attempting to discern whether a business practice has produced an unintended, yet adverse, effect on older workers—whether as an entire class or within smaller subgroups—necessarily would require age-based analyses of the employer's entire workforce, since the class of protected persons is guaranteed to change on a daily basis. Congress certainly did not mean to impose such an onerous—if not entirely impossible—task on employers under the ADEA, whose aim was to prohibit only arbitrary, intentional ageism.

Thus, while any employer's workforce can be divided neatly into two groups—those within the ADEA's protected class and those who aspire to be—conducting a statistical analysis to identify adverse impact is not so simple. Under this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), the comparator for the purposes of assessing potential age discrimination need not be outside the protected class, *i.e.*, under 40.

Accordingly, to monitor fully every conceivable age disparity, an employer would have to make a statistical comparison of the impact of each selection criterion on employees of every age to employees of every other age, every single day. Since a meaningful statistical comparison requires a sufficient sample size, this calculation would actually degenerate to a mere cohort analysis—in other words, a disparate treatment analysis.

B. Age Often Is Correlated With Legitimate Criteria Used by Employers as a Means of Differentiating Between Employees

Also unlike other protected characteristics, age regularly correlates with many factors quite legitimately used to differentiate individuals in the workplace—*e.g.*, seniority,

experience, educational attainment, salary levels, etc. Indeed, as the Seventh Circuit has noted, "virtually all elements of a standard compensation package" are correlated with age and, therefore, could not be curtailed in times of business adversity without creating prima facie violations of law if the impact theory were applicable under the ADEA. *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164-65 (7th Cir. 1992). The court concluded that such a construction of the ADEA would lead to results so patently unsatisfactory—indeed, "so remote from the objectives of civil rights law"—that it must be rejected. 967 F.2d at 1165.

Because of the progressive nature of age, these facially neutral policies necessarily will have a different impact on different individuals depending on their age at the time the business decision is made. *Ellis*, 73 F.3d at 1009; *see also* Miles F. Archer, Case Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000). Were this Court to recognize disparate impact claims under the ADEA, employers would be severely hampered in their ability to manage their businesses, for example, by responding to business downturns through the use of layoffs or reductions in force. This is particularly true now, when companies attempt to cope with the effects of a waning economy, exacerbated by the events of September 11th.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision below.

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February 2002

(17)

Supreme Court, U.S.
FILED
CLERK

No. 01-584

IN THE
SUPREME COURT OF THE UNITED STATES

WANDA ADAMS, LEO L. FLOYD, *et al.*,
Petitioners,

v.

FLORIDA POWER CORPORATION and
FLORIDA PROGRESS CORPORATION,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For the Eleventh Circuit

BRIEF *AMICI CURIAE* OF AARP, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS (AAUP), AMERICAN JEWISH CONGRESS, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), NATIONAL COUNCIL OF LA RAZA, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES AND THE NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY 4

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly 5

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination 6

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA 7

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS 9

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs 10

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination 12

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA 14

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination 18

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION 20

A. Stereotyping Is Often Unintentional 23

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes 25

CONCLUSION 29

TABLE OF AUTHORITIES

CASES **Pages**

Adams v. Florida Power Corp.,
255 F.3d 1322 (11th Cir. 2001) ..... *passim*

Albermarle v. Moody,
422 U.S. 405 (1975) 25, 30

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469 U.S. 287 (1985) 20

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863 F.2d 994 (D.C. Cir. 1998) 5

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477 F.2d 1245 (D.C. Cir. 1973) 20

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507 U.S. 619 (1993) 9

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939 F. Supp. 113 (D.P.R. 1996) 9

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467 U.S. 837 (1984) 16

Connecticut v. Teal,
457 U.S. 440 (1982) 4, 26

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48 F.3d 719 (3d) *cert. denied*, 516 U.S. 916 (1995) ... 28

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4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*,
179 F.3d 1348 (11th Cir. 1999) 22

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433 U.S. 321 (1977) 28

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41 F.3d 1073 (7th Cir. 1994), *cert. denied*,
515 U.S. 1142 (1995) 21, 23, 26

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623 F. Supp. 734 (D.C. Pa. 1985) 5

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460 U.S. 226 (1983) 10, 11, 21

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cert. denied, 517 U.S. 1245 (1996) 6, 7, 8, 19, 21

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529 U.S. 120 (2000) 16

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429 U.S. 125 (1976) 4

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328 U.S. 61 (1946) 9

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971 F.2d 818 (1st Cir. 1992),
cert. denied, 506 U.S. 1052 (1993) 5

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401 U.S. 424 (1971) 4, 11, 19, 26, 30

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507 U.S. 604 (1993) 10, 20, 21, 22

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498 U.S. 133 (1990) 5

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198 F.3d 1305 (11th Cir. 1999) 25

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533 U.S. 289 (2001) 16

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431 U.S. 324 (1977) 25

Johnson v. Combs,
471 F.2d 84 (5th Cir. 1972) 6

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480 U.S. 616 (1987) 9

Lorillard v. Pons,
434 U.S. 575 (1978) 5

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513 U.S. 352 (1995) 2, 6, 29, 30

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504 U.S. 374 (1992) 5

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164 F.3d 696 (1st Cir.) *cert. denied*,
528 U.S. 811 (1999) 6, 21

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404 U.S. 116 (1971) 9

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412 U.S. 427 (1973) 5, 6

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517 U.S. 308 (1996) 2

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441 U.S. 750 (1979) 5, 6

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522 U.S. 422 (1998) 2

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490 U.S. 228 (1989) 7

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530 U.S. 133 (2000) 2

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650 F. Supp. 482 (D.D.C. 1986) 20

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485 U.S. 293 (1988) 9

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490 U.S. 642 (1989) 7

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487 U.S. 977 (1988) 7, 20

STATUTES AND LEGISLATIVE HISTORY

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29 U.S.C. § 621(a) 11
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No. 01-584

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INTEREST OF *AMICI CURIAE*[1]

AARP is a nonprofit membership organization of more than 35 million people age 50 or older dedicated to addressing the needs and interests of older Americans. One of AARP's

[1] The consents of the parties have been filed with the Clerk of the Court. Pursuant to Supreme Court Rule 37.6, *Amici Curiae* state that no counsel for any party authored this brief in whole or in part and that no party or entity other than *amici curiae*, its members, or counsel made a monetary contribution to the preparation or submission of this brief.

primary objectives is to achieve dignity and equality in the work place through positive attitudes, practices, and policies regarding work and retirement. Through its research, publications, and training programs, AARP seeks to eliminate ageist stereotypes and their arbitrary discriminatory effects, encourage employers to hire and to retain older workers, and help older workers overcome the obstacles they encounter because of age. AARP supports the rights of older workers and the public policies designed to protect those rights and strives to preserve the legal means to enforce them.

This case is of utmost importance to AARP's members. More than 40 percent of AARP's members remain active in the work force. Most are protected by the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-633. The vigorous enforcement of the ADEA is of paramount importance for the millions of older workers who rely on the Act to deter and remedy invidious age bias in the work place. Since 1985, as part of its advocacy efforts, AARP has filed more than 200 *amicus curiae* briefs in this Court and in the federal district and appellate courts regarding the proper interpretation and application of the ADEA. In this Court, AARP has participated as *amicus curiae* in, among others, the cases of *Reeves v. Sanderson Plumbing Prods. Inc.*, 530 U.S. 133 (2000); *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998); *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996); and *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352 (1995).

This brief is also submitted on behalf of the American Association of University Professors (AAUP), the American Jewish Congress, the National Council of La Raza, the National Association For the Advancement of Colored People (NAACP), the National Partnership for Women & Families, and the National Women's Law Center, all of which support the rights of older workers to be free from employment discrimination, whether on grounds of race, gender, national origin, religion, or age. The statements of interest of these *amici* are included in the appendix to this brief.

Denying the disparate impact method of proving age discrimination to its victims will thwart the intent of Congress,

insulate from challenge discriminating conduct which Congress has deemed devastating to individuals, society, and the national economy, and undermine the core civil rights principle that workers should be judged based on their abilities rather than characteristics unrelated to their participation in the work force, such as age. Since the consequences of discrimination are equally devastating regardless of the employer's motivation or the protected status of the victim, older workers must be afforded the same rights and avenues for redress as those enjoyed by victims of other forms of employment discrimination.

Amici urge the Court to reject suggestions that age discrimination in the work place is so fundamentally different from other forms of employment discrimination that it can be adequately addressed by the disparate treatment theory alone. Holding that the ADEA encompasses both disparate treatment and disparate impact claims would be in complete harmony with the ADEA's congressional purpose as well as its legislative roots.

For these reasons, *Amici Curiae* respectfully submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

In order to fully implement the will of Congress expressed in the ADEA, older workers must have the right to pursue both disparate treatment and disparate impact claims. While the court below concluded that Congress limited ADEA claimants to the disparate treatment theory of proof, there is no persuasive evidence of such limits in either the text or legislative history of the ADEA. In light of the fact that this Court did not even articulate the disparate impact theory until four years *after* the enactment of the ADEA, the unavailability of the disparate impact method of proving age discrimination cannot be based on Congress' failure to mention "disparate impact" in either the text or legislative history of the ADEA.

Those courts that have restricted ADEA plaintiffs to the disparate treatment theory of proof have attributed to Congress

an intent to differentiate between ADEA claimants and Title VII claimants that is found nowhere in either statute. They have misapplied conventional tools of statutory construction. They have selectively misread the ADEA's legislative history, which, contrary to their conclusions, contains strong affirmative support for the disparate impact theory. And, they have failed to recognize how the function and purpose of the disparate impact theory, as articulated by this Court, is perfectly suited to policing what the Court has stated it considers to be the "essence" of age discrimination. These failures bolstered the erroneous conclusion that Congress did not intend the disparate impact theory to apply to the ADEA -- a result which Congress never contemplated.

I. THE COURT HAS CONSTRUED LANGUAGE IN TITLE VII THAT IS VIRTUALLY IDENTICAL TO THAT IN THE ADEA AS THE SOURCE OF THE DISPARATE IMPACT THEORY.

Section (4)(a)(2) of the ADEA provides that "[i]t shall be unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(2). This language is the mirror image of § 703(a)(2) of Title VII, 42 U.S.C. § 2000e(2)(a): the only difference being that the ADEA substitutes the word "age" for the words "race, color, religion, sex, or national origin." In *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971), the Court cited § 703(a)(2) as the statutory foundation for its decision that Title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation . . . ." 401 U.S. at 431. The Court has subsequently confirmed that the "adversely affect" language, that is identical to both Title VII and the ADEA, is the source of the disparate impact doctrine. *See Connecticut v. Teal*, 457 U.S. 440, 448 (1982); *General Electric Co. v. Gilbert*, 429 U.S. 125, 137 (1976).

In *Griggs*, the Court declared: "The objective of Congress in the enactment of Title VII *is plain from the language of the statute*." 401 U.S. at 429 (emphasis added). Accordingly, "[i]f the existence of the disparate impact approach is apparent from the 'plain' language of Title VII, it must also be apparent from the plain language of [the] ADEA." *EEOC v. Governor Mifflin Sch. Dist.*, 623 F. Supp. 734, 741 (D.C. Pa. 1985).

A. Since the ADEA and Title VII Share Common Purposes and Identical Substantive Provisions, They Should be Interpreted Similarly.

"The similarity in language [between § 623(a)(2) of the ADEA and § 703(a)(2) of Title VII] . . . is, of course, a strong indication that the two statutes should be interpreted *pari passu*." *Northcross v. Memphis Bd. of Educ.*, 412 U.S. 427, 428 (1973). *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144-45 (1990); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Greenwood Trust Co. v. Commonwealth of Mass.*, 971 F.2d 818, 827 (1st Cir. 1992), *cert. denied*, 506 U.S. 1052 (1993) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way."). The doctrine of *in pari materia* is especially appropriate for the ADEA and Title VII given that the substantive prohibitions of the ADEA "were derived *in haec verba* from Title VII." *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). *See also Arnold v. U.S. Postal Serv.*, 863 F.2d 994, 1003 (D.C. Cir. 1998) (Garth, J., dissenting) ("That the ADEA's coverage and provisions are substantially similar to the provisions of Title VII is no accident. The similarity between these two statutes flows from the fact that the ADEA was modeled after Title VII, relying on much of Title VII's actual language for its content.").[2/]

[2/] One textual difference between the ADEA and Title VII that courts have relied on to deny the disparate impact theory to age discrimination victims is § 623(f)(1) of the ADEA. This provision provides that employers may make decisions based upon "reasonable factors other than age." The provision is fully consonant with the disparate impact method of proving

(continued...)

The conclusion that identical language in the ADEA and Title VII was intended to prohibit the same forms of discrimination is bolstered by the fact that in addition to "shar[ing] common substantive features," the ADEA and Title VII share "a common purpose: 'the elimination of discrimination in the workplace.'" *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358 (1995) quoting *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979). In *Northcross v. Memphis Bd. of Educ.*, 412 U.S. at 428, the Court reasoned that interpreting statutes with similar language *pari passu* is particularly appropriate when "the two provisions share a common *raison d'etre*." (citing *Johnson v. Combs*, 471 F.2d 84, 86 (5th Cir. 1972)).

B. The ADEA's Prohibition of Decisions "Because of Such Individual's Age" Condemns Unintentional As Well As Intentional Age Discrimination.

The ADEA's substantive prohibitions, which were based directly on those in Title VII, state in pertinent part, that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age." 29 U.S.C. § 623(a)(1). In rejecting disparate impact analysis under the ADEA, the Tenth Circuit in *Ellis v. United Airlines, Inc.*, without citing any authority, declared that "[t]he most obvious reading of the clause, 'because of such individual's age,' is that it prohibits an employer from intentionally treating someone differently based on his or her age." 73 F.3d 999, 1007 (10th Cir.), *cert. denied*, 517 U.S. 1245 (1996). *See also Mullin v. Raytheon, Co.*, 164 F.3d 696, 700 (1st Cir.), *cert. denied*, 528 U.S. 811 (1999) ("A commonsense reading of ['because of such individual's age'] strongly suggests that the statute includes a requirement of intentional discrimination.").

[2/] (...continued)
age discrimination and in fact, mirrors disparate impact analysis. *Amici* fully agree with the arguments in the National Employment Lawyers Association's (NELA) *amicus curiae* brief that the RFOA provision supports a claim of disparate impact under the ADEA.

The problem with the Tenth Circuit's "obvious reading," and the First Circuit's "commonsense reading" of the statute, however, is that they are in direct conflict with this Court's construction of the identical language contained in Title VII, which likewise prohibits discrimination "because of" a protected characteristic. "The Supreme Court has repeatedly found the phrase 'because of' to permit disparate impact analysis, reasoning that the phrase codifies the requirement of a causal connection between the protected trait and the challenged employment practice." Keith R. Fentonmiller, "The Continuing Validity of Disparate Impact Analysis for Federal Sector Age Discrimination Claims, 47 AM. U. L. REV. 1071, 1121 (1998). *See, e.g., Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 660 (1989) ("The persuasion burden [under disparate impact analysis] must remain with the plaintiff, for it is he who must prove that it was '*because of* such individual's race, color, [etc.],' that he was denied a desired employment opportunity.') (emphasis added) (quoting 42 U.S.C. § 2000e-2(a)).[3/] "The causal connection is required in every discrimination case, no matter what the method of proof." Fentonmiller, at 1121.

C. The Civil Rights Act of 1991 Did Not Affect the Viability of Disparate Impact Claims Under the ADEA.

In *Ellis v. United Airlines, Inc.*, one of the cases the court below found "persuasive," *Adams v. Florida Power Corp.*, 255

[3/] *Accord Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) (plurality opinion) (interpreting words "because of" contained in Title VII's prohibition against sex discrimination to encompass "indirect stumbling block[s] to employment opportunities." such as in disparate impact cases challenging facially-neutral tests or qualifications); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-92 (1988) (plurality opinion) (holding that "an employer's undisciplined system of subjective decision making has precisely the same effects as a system pervaded by impermissible intentional discrimination," because "[i]n both circumstances, the employer's practices may be said to adversely affect [an individual's] status as an employee, *because of* such individual's [protected class]" (quoting 42 U.S.C. § 2000e-2(a)(2)) (emphasis added).

F.3d 1322, 1326 (11th Cir. 2001), the Tenth Circuit concluded that in failing to add a parallel provision to the ADEA when it enacted the Civil Rights Act of 1991 (CRA),[4] Congress "signal[ed] its intent not to provide for a disparate impact cause of action under the ADEA." 73 F.3d at 1008. The CRA added a provision to Title VII to define the burden of proof in a disparate impact case. Congress' failure to codify disparate impact analysis in the ADEA when it enacted the CRA does not, however, evince an intent to limit the doctrine to Title VII. There is simply no evidence that the issue was ever considered. As fully explained in Fentonmiller, 47 AM. U. L. REV. at 1126-28, arguments to the contrary do not bear scrutiny in logic and are not supported by the legislative history of the CRA.

Prior to the enactment of the CRA, Title VII did not mention disparate impact. And as Fentonmiller points out:

> even as amended, Title VII fails to state explicitly that an employment practice resulting in unjustified disparate impact is unlawful; the CRA did not alter the prohibitory language section 703(a) of Title VII. . . . Thus, any application of the disparate impact theory under Title VII still must invoke the Supreme Court's long-standing construction of section 703(a) as prohibiting practices that are fair in form, but discriminatory in operation.

47 Am. U. L. Rev. at 1128.

If there is any inference to be drawn from Congress' actions or inactions in 1991, it is that the CRA's failure to define disparate impact and explicitly make it an unlawful employment practice demonstrates a strong congressional belief that disparate impact analysis already was encompassed by the prohibitory language which has been in the statute since 1964. *Id.* As previously explained, that language prohibits discrimination, whether proved through disparate treatment or

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[4] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

disparate impact analysis. Since the absence of the words "disparate impact" in Title VII prior to 1991 did not make disparate impact analysis any less legitimate under Title VII, the same should be true for the ADEA after 1991.

Legislative restraint provides another plausible explanation for the CRA's silence with regard to disparate impact analysis under the ADEA. Specifically, "[t]he 1991 amendments responded to several Supreme Court opinions which arguably hurt Title VII plaintiffs. There was no comparable judicial assault on the ADEA, as no court had ever found disparate impact analysis unavailable to ADEA plaintiffs." *Camacho v. Sears Roebuck*, 939 F. Supp. 113, 120 (D.P.R. 1996). In such circumstances, the Court has "frequently cautioned that '[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.'" *NLRB v. Plasterers' Local Union No 79*, 404 U.S. 116, 129-30 (1971) quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946); *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), quoting *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."). *See also Johnson v. Santa Clara Transp. Agency*, 480 U.S. 616, 629 (1987) (Scalia, J., dissenting) ("*any* reliance on congressional failure to act is necessarily a 'canard.'") (emphasis in original).

II. THE ADEA'S LEGISLATIVE HISTORY DEMONSTRATES CONGRESS' INTENT TO REDRESS ALL FORMS OF "ARBITRARY" AGE BIAS, INCLUDING NEUTRAL POLICIES AND PRACTICES WITH A DISPARATE IMPACT ON OLDER WORKERS.

Despite the strong textual similarity between the ADEA and Title VII, courts questioning "disparate impact" as a valid theory under the ADEA have looked to its legislative history, and in particular, to a Report by U.S. Labor Secretary W.

Willard Wirtz,[9] on which Congress drew heavily in crafting the ADEA. *See, e.g., Adams v. Florida Power Corp.*, 255 F.3d at1325; *see also* Respondent's Brief in Opp. at 14 (asserting importance of Wirtz Report). *Accord Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

Hazen Paper's analysis of legislative history concerning the disparate impact issue was necessarily limited, because only a disparate treatment claim was before the Court. *See* 507 U.S. at 610. However, no such explanation exists for the superficial analyses of the ADEA's legislative history in *Adams* and other appellate decisions squarely addressing the availability of the disparate impact theory. A fresh analysis by this Court is now warranted. Its conclusions should be harmonized with the diverse and powerful evidence supporting disparate impact claims under the ADEA, including Congress' determination to outlaw all age discrimination shown to be "arbitrary," whether in its intent or its effects.

A. The ADEA's History Demonstrates Congress' Intent to Ban All "Arbitrary" Age Discrimination, Including Age-Neutral Policies and Practices that Fall More Harshly on Older Workers and Do Not Meet Genuine Employer Needs.

In *EEOC v. Wyoming*, the Court recounted the ADEA's early legislative history, including unconsummated efforts to "ban discrimination on the basis of age as well as race, color, religion, sex, and national origin" in Title VII of the 1964 Civil

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[9] U.S. Dep't of Labor, *The Older Worker: Age Discrimination in Employment, Report of the Secretary of Labor Under Section 715 of the Civil Rights Act of 1964* (1965) (hereinafter "Wirtz Report"), *reprinted* in Joint Appendix ("JA") at 350-416. The Wirtz Report was compiled after Congress directed the Secretary to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and the consequences of such discrimination on the economy and individuals affected," in Section 715 of the 1964 Civil Rights Act. Pub. L. No. 88-352, 78 Stat. 241, 265 (1964).

Rights Act. 460 U.S. 226, 229, 230-32 (1983).[9] The Wirtz Report, the principal document establishing Congress' purpose in enacting the ADEA, *id.* at 229-231, clearly recognized as arbitrary facially neutral policies and practices falling more harshly on older workers.

The Wirtz Report's "findings were confirmed throughout the extensive factfinding undertaken by the Executive Branch and Congress." *EEOC v. Wyoming*, 460 U.S. at 230-31. Congress directed the Secretary "to submit specific legislative proposals for prohibiting age discrimination"; these were endorsed by President Johnson and culminated in the 1967 law enacted by Congress. *Id.* at 230-32. For instance, the ADEA's preamble, 29 U.S.C. § 621(a), summarizes findings in the Wirtz Report on "individual and social costs of age discrimination." *Id.* at 231. Likewise, the ADEA's text paraphrases strategies endorsed in the Report: "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

The ADEA's focus on banning "arbitrary" discrimination anticipates the articulation in *Griggs* of "disparate impact" as a method for the "removal of artificial, *arbitrary,* and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification." 401 U.S. at 431 (emphasis added). The term "arbitrary discrimination" originated with Congress' directive to the Secretary requiring a report on age bias: ". . . The Secretary of Labor shall make a report to the Congress . . . containing the results of such study and shall include in such report such recommendations for legislation to prevent *arbitrary discrimination* in employment because of age as he determines advisable." JA 354. (emphasis added).

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[9] Efforts at the federal level "date back at least to the 1950s," *Id.* at 229 and n.2. In 1903 Colorado became the first state to adopt an age discrimination law applicable to employment; by 1965 twenty states and Puerto Rico had such laws. JA 374-75.

In the Wirtz Report "arbitrary discrimination" is identified as the "kind [of bias] which might be dealt with by a statute prohibiting discrimination in employment on the basis of age." JA 398. The Secretary also described "arbitrary discrimination" as the conduct most comparable to employment discrimination banned by the 1964 Civil Rights Act. Specifically, "arbitrary discrimination" was defined as the "non-employment" or "rejection" of older workers "because of assumptions about the effect of age on their ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* 355 (emphasis in original). The Report discussed at length findings of a special study of express – *i.e.*, intentional – age limits in employment.[1/] However, the Report also condemned employer conduct with the same result – lesser opportunity for older workers – but involving unintentional discrimination.

1. The Wirtz Report Identified Neutral Employment Standards as a Form of Arbitary Discrimination.

Secretary Wirtz pinpointed the most serious danger to employment of older workers as "advancing science" and "changing technology." These, he explained, lead employers to adopt new job requirements difficult for older workers to meet; however, such criteria may be unrelated to actual job needs. JA 359-60. Thus, the Report described as unjust one of the precise job criteria held unlawful six years later in *Griggs* on a theory of disparate impact: a high school graduation requirement for new employees, unjustified in terms of applicants' ability to do the job, and falling more harshly on members of a protected group, some of whom were qualified by virtue of experience, but few of whom graduated high school. *Id* 359.

1/ The study looked at 500 firms in five cities in those states without age bias statutes in order to assess "the most obvious," but not the only serious kind of age discrimination in employment: "employer policies of not hiring people over a certain age, without consideration of a particular applicant's individual qualifications." JA 364-65.

The logic of Wirtz' concern is clear: in a U.S. labor market where educational attainment was (and still is) growing rapidly among younger workers, older workers consistently will fall short. The Secretary therefore concluded, "[a]ny employment standard" based on educational attainment "will obviously work against the employment of many workers – unfairly, if despite his limited schooling, an older worker's years of experience have given him the relevant equivalent [qualifications]." JA 359. In similar fashion, the Wirtz Report addressed effects of "aptitude and other entrance tests" on older workers, concluding:

> there is no evidence that older workers' experiences are different from those of the population generally, except in one respect – the better showing of younger, better-educated workers on tests in which performance is affected by recency of education and testing experience.

Id. 387. Secretary Wirtz reasoned that some jobs require workers with "better" or more "recent" education, but others do not. For instance, "average performance of older workers compares most favorably in office jobs, where productivity ... rose with age." *Id.* 388.

Even if Secretary Wirtz in 1965 did not identify the "disparate impact" method of proof that this Court recognized as a means to combat "arbitrary discrimination" in 1971, his Report clearly acknowledged that age-neutral job criteria could produce "arbitrary discrimination" against older workers even though such criteria might be founded simply on faith in "'progress,'" JA 358-59, rather than age-based animus. By describing such age-neutral bias as "arbitrary," the Report clearly supported it being banned in what became the ADEA.

The Wirtz Report also specifically found evidence of "arbitrary discrimination" in still other types of employment policies and practices involving unintentional bias against older workers. With regard to "Institutional Arrangements that Indirectly Restrict the Employment of Older Workers, " JA 389, the Report stated broad concern, about "arbitrary"

discrimination. In particular, Secretary Wirtz opined that "[t]he practice of generalizing personnel hiring policy by arbitrary rules which ignore individual differences is itself a factor that deprives companies of talent and qualified workers of opportunity." *Id.* Similarly, the Report observed with regard to employer benefit plans that:

> The extent to which the range of pension-plan induced limitations on employment can be considered to constitute arbitrary discrimination is not a simple matter, particularly in light of the great variations in plan provisions and employer practice. Case-by-case examination is necessary to separate reasonable from unreasonable practice.

Id. 397.

2. Regulations and Advisory Opinions Reaffirm That Age-Neutral, Non-Job-Related Policies and Practices With Adverse Impacts on Older Workers May Violate the ADEA.

Secretary Wirtz took advantage of several opportunities to provide guidance for interpreting the ADEA. Following the ADEA's enactment, the Secretary supervised issuance of two sets of materials highly relevant to interpretation of the new law. First, the Department of Labor promulgated interpretative regulations, *see* 29 C.F.R. Part 860 (1968), within days after the ADEA went into effect. Second, in the months following the ADEA's enactment, the Department began issuing interpretive opinion letters. Both sources strongly reaffirmed language in the Report to the effect that the ADEA was intended to ban age-neutral, non-job-related, employment practices with adverse disparate impact on older workers.

The regulations required, *inter alia*, with regard to physical requirements: (a) that age-neutral fitness standards be "reasonably necessary for the specific work to be performed"; (b) that a "differentiation based on a physical examination, but not one based on age" was "reasonable" only for positions which "necessitate" stringent physical requirements; and (c)

that pre-employment physical examinations distinguish between the physical demands of various jobs.[8/] In addition, the regulations provided that age-neutral employment evaluation criteria like quantity of output, quality of production, or educational level had to have "a valid relationship to job requirements." 29 C.F.R. § 860.103(f)(1)-(2).[9/]

The regulations also clarified an important aspect of the Wirtz Report. In the Secretary's discussion of express age limits, he noted that

> [a] significant proportion [are] arbitrary in the sense that they have been established without any determination of their actual relevance to job requirements, and are defended on grounds apparently different from their actual explanation.

JA 368. The Report enumerated nine such employer "defenses" of age limits, eight of which (other than "Desired age balance in the work force") have no direct connection to age. *Id.* 369. Thus, the regulations confirm, as suggested in the Report, that even after the enactment of the ADEA, most age

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8/ These provisions, 29 CFR § 860.103(f)(1)-(2), "were entirely consistent with Secretary Wirtz's findings three years earlier that physical requirements (i.e., strength, speed, dexterity, quantity of work) were employers' most frequently mentioned consideration for restrictions on the hiring of older workers, but that many of these requirements had 'no studied basis.'" Fentonmiller, 47 AM. U. L. REV. at 1104 and 195, 196 (quoting WR at 8, and referring to the Secretary's Research Materials at 4, 11-12). The Secretary submitted the "Research Materials" to Congress in June 1965 along with and in support of the Report. *See* JA 352.

9/ In this respect, the regulations also "echoed the Secretary's prior criticism of unfair educational requirements that 'penalize' the older worker [and] his finding that written tests with 'little direct relationship to the jobs' tended to preclude the employment of otherwise qualified older applicants." Fentonmiller, 47 AM.U. L. REV. at 1104-05 and nn. 198-200 (quoting Research Materials at 81, and citing *id.* at 14, Wirtz Report at 3 [JA 358-60].

limits made unlawful by the Act could be defended on age-neutral grounds, thus raising the issue how to assure that the "arbitrary discrimination" many of them represented could be challenged. The regulations did *not* answer this question by directing attention to the intentional discrimination such neutral rules might mask, consistent with the later-developed "disparate treatment" method of proof. Rather, the regulations identified guidelines for identifying which neutral rules with adverse impact on older workers are justified by employer needs, consistent with the later-developed "disparate impact" theory of proof.[10/] The EEOC's current ADEA regulations are to the same effect, as Judge Barkett recognized in her *Adams* concurrence. That is, they recognize that the "reasonable factors other than age" defense "works in tandem with the business necessity defense in the disparate impact analysis." 255 F.3d at 1328.[11/]

These regulations are entitled to substantial deference in interpreting the ADEA's text, to the extent the Court decides that language employing traditional methods of statutory construction is ambiguous authorized. *Chevron USA v. Natural Resources Def. Council*, 467 U.S. 837, 843 n.9 (1984). *See INS v. St. Cyr*, 533 U.S. 289, 121 S.Ct. 2271, 2290 n.45 (2001); *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120, 132 (2000) (where an agency responsible for administering a statute

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[10/] The same can be said of the regulations as revised in early 1969 to clarify, for example, that even a validated employee test had to be "specifically related to the requirements of the job," as well as "fair and reasonable." 29 C.F.R. § 860.104(b) (1969).

[11/] Congress reassigned responsibility for administering the ADEA from the Department of Labor to the EEOC in 1979. *See* Reorg. Plan No. 1 of 1978, 92 Stat. 3781, 43 Fed. Reg. 19807 (May 9, 1979). Current regulations require that employment practices with an adverse impact on individuals 40 and over that are defended as based on reasonable factors other than age "can only be justified as a business necessity." 29 C.F.R. § 1625.7(d) (2001). And if an employment test has such adverse impact, it must be validated according to the Uniform Guidelines on Employee Selection Procedures *See id.* § 1607 (2001).

has issued rules interpreting it, and Congress has not expressed its intent "unambiguously," the "reviewing court must respect the agency's construction of the statute so long as it is permissible"). *See also Adams,* 255 F.3d at 1328 and n.10 (Barkett, J., concurring).

Also in 1968, Secretary Wirtz' Department of Labor issued several advisory opinions regarding ADEA implementation confirming the view that age-neutral employer practices were subject to the Act. These declared, *inter alia,* that "'facially-neutral job requirements and employment practices, such as testing, must be validated and job-related.'" Fentonmiller, 47 AM.U. L. REV. at 1104 and n.204 (citing Charles T. Lindquist, Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't of Labor, ADEA Opinion Letter (August 1, 1968) and Ben P. Robertson, Deputy Administrator, Wage and Hour and Public Contracts Divisions, U.S. Dep't. of Labor, ADEA Opinion Letter (October 9, 1968)).

Wirtz consistently urged that the ADEA be interpreted broadly, in order to root out unfair and arbitrary treatment of older workers. In 1976 Congressional hearing testimony, former Secretary Wirtz lamented the lack of progress in eliminating barriers to age bias in the workplace and concluded: "there is more reason now, not less, for rigorous enforcement of the ADEA."[12/] The Secretary also expressed expansive views of age discrimination legislation in his 1967 testimony, stating that the purpose of the proposed ADEA was "to get away from arbitrary age distinctions and go to judgment of individuals on their merits;" he wondered "whether we should strike any reference to age at all in any connection and look at employment only in terms of whether the individual does have or does not have the capacity to do whatever job it is

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[12/] *Impact of the Age Discrimination in Employment Act of 1967, Before the Subcomm. on Retirement Income and Employment, House Select Comm. on Aging*, 94th Cong. 2d Sess. 81 (1976).

that that individual is seeking."[13/] In the 1965 Report, at the outset of his "Conclusions and Recommendations," Wirtz declared:

> It would be the worst misfortune if the problem of age discrimination in employment, having come to the Congress' attention, were posed so narrowly as to result in superficial prescription.

JA 403. Yet, that would be the precise result if the Eleventh Circuit's ruling is affirmed.

B. The Eleventh Circuit Erred in Concluding that the Legislative History of the ADEA Precludes Reliance on the Disparate Impact Approach to Proving Age Discrimination

The Eleventh Circuit cited two grounds related to legislative history for its affirmance of the district court's conclusion that the ADEA does not permit liability to be established by the disparate impact method of proof. Each is unfounded. First, the court opined that the Wirtz Report differentiated between proof now known as disparate treatment and disparate impact and recommended that Congress only ban the former. Second, the court alleged that the history of the ADEA differs materially from that of Title VII, "which the Supreme Court in *Griggs* relied on to find a cause of action for disparate impact."

The *Adams* court's oversimplified rendering of the Wirtz Report ignores numerous instances in which the Report condemns as "arbitrary" and called for the elimination of disparate impacts of neutral employer practices on older workers. As demonstrated *supra* at 12-14, it was clear error to suggest that the Report concluded that "arbitrary

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13/ *Age Discrimination in Employment, 1967: Hearings on S. 830 & S. 788 Before the Subcomm. On Labor of the Senate Comm. On Labor and Pub. Welfare*, 90th Cong. 51-52 (1967). Secretary Wirtz also asserted that the labor market was "putting more and more people with more and more competence and capacity out to pasture earlier and earlier."

discrimination" corresponds only with "disparate treatment based on stereotypical perceptions of the elderly," or that all other "factors affecting older workers, such as policies with disparate impact, should be addressed in alternative ways." 255 F.3d at 1325. Rather, the Report mapped out a more complex taxonomy of age discrimination, in which some "arbitrary" age bias is explicit, but some is founded on actions of an "unthinking majority," JA 358, and still more is premised on unjustifiable – but age-neutral – reliance on tests, physical and educational criteria and other factors unrelated to a worker's productivity or ability to do the job in question. Thus, in the Secretary's view, some policies that have what we now call "disparate impact," amounted to arbitrary bias and constituted an appropriate target for legal liability.

The *Adams* court also endorsed a superficial analysis of the Wirtz Report in *Ellis*. The *Ellis* court asserted, without explanation that "arbitrary discrimination" equals intentional bias and all factors affecting "older workers more strongly as a group" equals disparate impact. *See Ellis*, 73 F.3d at 1008 (citing Wirtz Report at 5, 11) *See* JA 361-62, 378. Hence, neither *Ellis* nor *Adams* reflects an accurate reading of the Report; any review of the Secretary's background "Research Materials;" any consideration of Wirtz' 1967 Senate testimony (or any other legislative records of Congress' original enactment of the ADEA); any analysis of the 1968 interpretive regulations – also penned by Secretary Wirtz; or of the 1968 advisory opinions issued by Wirtz' Labor Department. Surely some greater effort was necessary to justify the *Adams* court's cavalier use of terms invented years after the ADEA's enactment in 1967 – "disparate treatment" and "disparate impact" – to interpret a report issued in 1965.

The *Adams* court compounded its error by characterizing as alien to the Wirtz Report, and thus to the legislative history of the ADEA, a key aspect of Congress' work in enacting Title VII: attention to whether a challenged job requirement had "'a manifest relationship to the employment in question.'" 255 F.3d at 1325-26 (quoting *Griggs*, 401 U.S. at 432). Yet the very same concern drove Secretary Wirtz to catalogue various harms to older workers, including some due to neutral

employer practices, and to condemn all those he deemed "arbitrary," precisely because they had no basis in "ability to do a job." JA 355. Hence, the legislative records of both Title VII and the ADEA support reliance on the disparate impact method of proof.

Finally, regardless how one reads the legislative history, the prohibitions in § 4 of the ADEA, 29 U.S.C. § 623, do not contain the word "arbitrary." Instead, the prohibitory language mirrors that of Title VII. Consequently, the specific prohibitory language of § 4 trumps any contrary inference that may arise from the legislative history or in language in the findings and purpose section of the statute. *See Bissette v. Colonial Mortgage Corp.*, 477 F.2d 1245, 1246 n.2 (D.C. Cir. 1973); *Samuels v. Dist. of Columbia*, 650 F. Supp. 482, 484 (D.D.C. 1986).

III. THE COURT HAS RECOGNIZED THAT DISPARATE IMPACT IS MORE EFFECTIVE THAN DISPARATE TREATMENT IN POLICING WHAT THE COURT CONSIDERS TO BE THE "ESSENCE" OF AGE DISCRIMINATION.

In *Watson v. Fort Worth Bank & Trust*, a plurality of the Court noted that the disparate impact theory of proof is necessary to combat "the problem of subconscious stereotypes and prejudices," 487 U.S. 977, 990 (1988), because they cannot be "adequately policed through disparate treatment analysis."[14/] Given that the Court has also stated that the "essence of age discrimination" is older workers being harmed by "inaccurate and stigmatizing stereotypes," *Hazen Paper Co.*, 507 U.S. at

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[14/] *See also Alexander v. Choate*, 469 U.S. 287, 292-99 (1985) (discussing the *appropriateness* of disparate impact analysis under § 504 of the Rehabilitation Act since discrimination against the handicapped results from thoughtlessness not animus) (emphasis added).

610[15/] the disparate impact theory must be available to attack the serious problem of age discrimination in the work place.[16/]

Much of the confusion appears to arise from the Court's comment in *Hazen Paper* that "[d]isparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA," 507 U.S. at 610. Based on that language, which was not central to the decision, several courts have wrongly inferred that "the ADEA only prohibits intentional discrimination." *Ellis*, 73 F.3d at 1008. *See also Mullin*, 164 F.3d at 701("the inescapable implication of [Justice O'Connor's] statements is that the imposition of disparate impact liability would not address the evils that Congress was attempting to purge when it enacted the ADEA."). These courts erred in taking such a giant leap from dictum on the nature of age discrimination.

First, while there can be no question that *one* of the reasons Congress enacted the ADEA was to combat discrimination based on "stereotypes unsupported by objective fact," *EEOC v. Wyoming*, 460 U.S. at 231, there is no basis in either the

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[15/] In *EEOC v. Wyoming*, the Court also recognized, as the Wirtz Report explained, that irrational judgments based on age stereotypes were "often defended on grounds different from [their] actual causes." 460 U.S. at 231; *see* JA 368-71. The Report elaborated that explicit age limits often were defended on age-neutral grounds, which non-age-based rationales were "undoubtedly believed to be in many cases" the true explanations of age limits. *Id.* 369.

[16/] Judge Cudahy recognized this seemingly obvious contradiction in his dissent from *EEOC v. Francis W. Parker School*: "[T]he disparate impact theory of liability is designed as a means to *detect* employment decisions that reflect 'inaccurate and stigmatizing stereotypes,' . . . This is precisely the determination that *Hazen Paper* says the ADEA is intended to outlaw." 41 F.3d 1073, 1080-81 (7th Cir. 1994), *cert. denied*, 515 U.S. 1142 (1995) (emphasis in original). *See also* Steven J. Kamenshine, "The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act, 42 FLA. L. REV. 229, 309 (1990) ("[T]he assertion that age discrimination results from unconscious stereotyping arguably cuts in favor of, not against, the application of disparate impact in age cases.").

language or the legislative history of the ADEA to restrict its reach to employment decisions based on stereotypes.[17/] Surely it was not the intent of this Court in *Hazen Paper* to thwart the will of Congress by grafting an additional criterion of proof onto the ADEA, severely curtailing the Act's broad protections.[18/]

[17/] Taken at face value, this Court's comments are corroborated in the legislative record of the ADEA, which featured prominently the seemingly nationwide phenomenon of "persistent and widespread use of age limits in hiring." JA 364-67, 404. Yet the very same can be said of Congress' proceedings in enacting Title VII. That is, "facially-race discriminatory employment practices [were] the primary impetus behind the passage of Title VII in 1964," yet "[o]bviously disparate treatment does not define the limit of Title VII's reach, even though it may 'capture the essence' of Title VII's prohibitions." Fentonmiller, 47 AM.U. L. REV. at 1112; *see* Kamenshine, 42 FLA. L. REV. at 291("in the same way Congress was preoccupied with overt racial policies when it outlawed race discrimination under Title VII"). It follows that Congress' and Secretary Wirtz's attention to "overt age restrictions as the most glaring age-based obstacles," *id.*, should not limit the reach of the ADEA.

[18/] Incredibly, courts have gone even further and required ADEA plaintiffs to produce evidence that the employer's decision was motivated by inaccurate and stigmatizing stereotypes about older workers. *See, e.g., Dilla v. West*, 4 F. Supp. 2d 1130 (M.D. Ala. 1998), *aff'd per curiam*, 179 F.3d 1348 (11th Cir. 1999) (holding that employer did not violate the ADEA when it refused to hire applicants based on their proximity to retirement eligibility because "the mere fact that there exists a perfect correlation, or even a direct link, between age and the factor purportedly relied upon by the employer," *id.* at 1142-43, does not mean the employer impermissibly relied on age given that "age discrimination occurs *only* when 'the problem of inaccurate and stigmatizing stereotypes' about older workers are operative.") *Id.* at 1142 (emphasis added).

A. Stereotyping Is Often Unintentional.

Since actions based on stereotypes are not necessarily intentional,[19/] it is erroneous to conclude that because inaccurate stereotypes are often behind age discrimination the ADEA only prohibits intentional discrimination. Actions based on stereotypes can be, and more often than not are, unintentional, and the disparate impact theory is particularly well-suited to combat discrimination caused by unintentional stereotyping. After all, the premise of the disparate impact theory is that "not all discrimination is apparent and overt. It is sometimes subtle and hidden. It is at times hidden even from the decisionmaker herself, reflecting perhaps subconscious predilections and stereotypes." *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1080 (J. Cudahy, dissenting). This is especially true of age discrimination. Applying the disparate impact theory to the ADEA is consistent with the research on the nature and causes of ageism.[20/]

[19/] The argument that disparate impact is inappropriate where discrimination is caused by stereotypes, not animus, "jeopardize[s] the availability of disparate impact in gender cases as well because gender discrimination, like age, is based more on paternalistic stereotypes than on malevolence." Kaminshine, 42 FLA. L. REV. at 310 (footnote omitted). For that matter, while "race discrimination is steeped in a history of unparalleled hatred and bigotry . . . race discrimination today is often based on the same kind of stereotypes and group-based assumptions about ability that form the basis of age discrimination." *Id.*

[20/] The term "ageism" was coined by Robert N. Butler, M.D. to describe the "deep and profound prejudice against the elderly which is found to some degree in all of us." Robert N. Butler, WHY SURVIVE?: BEING OLD IN AMERICA 11 (1975). Butler describes ageism as:

> a process of systematic stereotyping of and discrimination against people because they are old, just as racism and sexism accomplish this with skin color and gender . . . Ageism allows the younger generations to see older people as different from themselves; thus they

(continued...)

> Age distinctions are particularly unique because they so often are used thoughtlessly rather than as intentional expressions of invidious malice or even mildly bigoted intent. Age discrimination . . . typically results from employers' ignorance about older workers, rather than active dislike of them. Because of this relatively innocuous nature of ageism, the likelihood is considerable that employers may adopt facially neutral policies without recognizing or caring that these policies may have a disparate impact upon older workers.

Howard Eglit, "The Age Discrimination in Employment Act's Forgotten Affirmative Defense," 66 BOSTON LAW REV. 155, 222 (1986).

Recent research has focused on this unconscious age discrimination, also called "implicit ageism." "'[I]mplicit ageism' is defined as the thoughts, feelings, and behaviors toward elderly people that exist and operate without conscious awareness or control, with the assumption that it forms the basis of most interactions with older individuals." Becca R. Levy, "Eradication of Ageism Requires Addressing the Enemy Within, 41 THE GERONTOLOGIST 578, 578 (Oct. 2001). In a related study, the authors explained:

> Age-related biases . . . may have become so routinized that they may influence social judgments at a level below that at which we consciously ascribe traits to others. Such 'automatic' ageism may be hard to eradicate if it has been incoporated into our implicit personality theories or social schemata and is evoked without awareness on our part.

20/ (...continued)

> subtly cease to identify with their elders as human beings.

Id. at 12.

Charles W. Perdue & Michael B. Gurtman, "Evidence for the Automaticity of Ageism," 26 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 199, 201 (1990). Unconscious ageism is pervasive in our society. "Ageism permeates our culture so thoroughly and conditions our attitudes and perceptions so much that most of us are unaware of most of the ageism in it." Erdman B. Palmore, AGEISM: NEGATIVE AND POSITIVE 98 (2d ed. 1999).

Unconscious discrimination is not unique to age discrimination. Like ageism, "[r]acism is in large part a product of the unconscious. It is a set of beliefs whereby we irrationally attach significance to something called race. . . ." Charles R. Lawrence, III, "The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism," 33 STAN. L. REV. 317, 330 (1987).[21/] However, "[a] survey of implicit ageism found that 95% of the participants had negative views of old people . . . a higher proportion than for implicit racism or sexism." Levy, at 578.

B. Disparate Impact is the Most Effective Tool for Policing Discrimination Based on Stereotypes.

It is well established in Title VII jurisprudence that disparate impact is a valuable tool in ferreting out subtle forms of discrimination. *See, e.g., In re: Employment Discrimination Litigation Against the State of Alabama*, 198 F.3d 1305, 1321 (11th Cir. 1999) ("a genuine finding of disparate impact can be highly probative of the employer's motive since a racial 'imbalance is often a telltale sign of purposeful discrimination.'") (quoting *International Board of Teamsters v. United States*, 431 U.S. 324, 339-40 n.20 (1977)). Indeed, this Court long ago recognized that disparate impact may serve as an effective method of identifying intentional bias that is well hidden. *See Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975) (employer refusal to follow alternative

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21/ *See* Deborah L. Rhode, "The 'No-Problem' Problem: Feminist Chalenges and Cultural Change," 100 YALE L.J. 1731, 1764-68 (1991) for a discussion of studies establishing unconscious sexism.

workplace practice with lesser discriminatory impact is evidence that the challenged practice was merely a "pretext" for discrimination); *Connecticut v. Teal*, 457 U.S. 440, 447 (1982) (same).[22/]

The fact that "age discrimination is characterized more by indifference and thoughtless bias than by overt hostility . . . makes detection of unlawful motive impractical and enhances the risk of evasion." Kamenshine, at 318. "If individuals are not aware that a negative stereotype of age has been automatically triggered by a person's older age, they are likely to attribute their behaviors (e.g., failure to hire. . .), to another factor that better fits their preferred self-images as reasonably fair individuals. Thus, rather than acknowledge that 'I hired a younger person in preference to an older person,' a rationalization, such as the older applicant's personality or training, might be evoked." Levy, at 578. *See also* Perdue, & Gurtman, at 200 ("characterizing the aged as unemployable, unintelligent, and 'naturally' unhealthy may help to rationalize discriminatory practices in employment . . . ."). As one commentator observed with regard to the same phenomenon in the context of race discrimination:

> When racism operates at a conscious level, opposing forces can attempt to prevail upon the rationality and moral sensibility of racism's proponents . . . . But when the discriminator is not aware of his prejudice . . . neither reason nor moral persuasion is likely to succeed. The process defect is all the more intractable, and judicial scrutiny becomes imperative.

22/ *See also Adams*, 255 at 1327 (in *Griggs* "the Supreme Court recognized that although discriminatory intent could be hidden, *even from the decisionmaker himself*, its effects in the workplace could not.") (Barkett, J. concurring) (emphasis added); *EEOC v. Francis W. Parker Sch.*, 41 F.3d at 1078 ("Moreover, disparate impact theory does not relieve the EEOC of its obligation to prove the error of the employer's ways. ... Ultimately, the EEOC must show that Parker's rationale is pretextual and ... is predicated on some stereotype, conscious or *unconscious*") (emphasis added).

Lawrence, 39 STAN. L. REV. at 349. Disparate impact is just as crucial to combating age discrimination as it is to challenging prejudice based on race, national origin, or sex. "People are more conscious of these latter biases but often are unaware of their age bias. Age stereotypes persist because people tend not to examine the basis for these stereotypes and also give disproportionate weight to any data they believe tend to support them." Raymond F. Gregory, AGE DISCRIMINATION IN THE AMERICAN WORKPLACE: OLD AT A YOUNG AGE 26-27 (2001).

Those circuits that have precluded the application of disparate impact to ADEA cases "seem to assume that only barriers based on animus create problems. But one can have a 'status quo' based on inaccurate stereotypes that society needs to destroy as much as one can have 'status quo' based on animus that should be swept away." Roberta Sue Alexander, "Comment: The Future of Disparate Impact Analysis for Age Discrimination in a Post-Hazen World," 25 DAYTON L. REV. 75, 94 (1999).

If ADEA claims can be established only through disparate treatment analysis, with the requisite proof of conscious discriminatory purpose, individual discrimination claims will not be able to address the issue of unconscious prejudice and the "essence" of age discrimination will be insulated from challenge. Indeed, if as this Court suggested age discrimination is most often caused by stereotypes, then "a theory that tests only for intentional discrimination necessarily misses its mark much of the time." David Benjamin Oppenheimer, "Negligent Discrimination," 141 U. PENN L. REV. 899, 903-04 (1993). The end result is a "status quo" of age bias based on unconscious stereotyping. Indeed, research on age stereotyping suggests that we have already reached such a "status quo." Such research demonstrates that most individuals harbor specific beliefs about older people, that most of those beliefs are inaccurate, and that the stereotypes have persisted in disadvantaging older persons for decades.[23/] For example,

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23/ J. Levin and W.C. Levin, AGEISM: PREJUDICE AND DISCRIMINATION

(continued...)

research on age stereotyping in employment has consistently found that older employees are almost always treated and rated less favorably than younger employees.[24/]

The claim that older workers do not suffer from "the entrenched effects of past discrimination"[25/] is a flawed basis for discarding disparate impact theory under the ADEA. As this Court itself has recognized, "We have not limited this principle [that some facially neutral employment practices are unlawful even in the absence of discriminatory intent] to cases in which the challenged practice served to perpetuate the effects of pre-Act intentional discrimination." *Watson*, 487 U.S. at 988.[26/]

[23/] (...continued)
AGAINST THE ELDERLY 70-96 (1980).

[24/] *See, e.g.*, Marc Bendick, Jr., Lauren E. Brown, & Kennington Wall, "No Foot in the Door: An Experimental Study of Employment Discrimination Against Older Workers," 10(4) JOURNAL OF AGING & SOCIAL POLICY 5 (1999); Marc Bendick, Jr., Charles W. Jackson, & J. Horacio Romero, "Employment Discrimination Against Older Workers: An Experimental Study of Hiring Practices," 8(4) JOURNAL OF AGING & SOCIAL POLICY 25 (1996); William C. Levin, "Age Stereotyping," 10(1) RESEARCH ON AGING 134 (March 1988); Bruce J. Avolio & Gerald V. Barrett, "Effects of Age Stereotyping in a Simulated Interview," 2 PSYCHOLOGY AND AGING, March 1987, at 56; Benson Rosen & Thomas H. Jerdee, "The Nature of Job-Related Age Stereotypes," 59 JOURNAL OF APPLIED PSYCHOLOGY 511 (1976); Benson Rosen & Thomas H. Jerdee, "Influence of Age Stereotypes on Managerial Decisions," 61 JOURNAL OF APPLIED PSYCHOLOGY 428 (1976).

[25/] *DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719, 732 (3d Cir.), *cert. denied*, 516 U.S. 916 (1995).

[26/] *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 339-40 (1977) (height and weight requirements had a disparate impact on women; a decision that had nothing to do with historical discrimination).

The Wirtz Report also provides several answers to the argument that ageism lacks any history of entrenched bias. First, the Report documents a substantial record of "persistent and widespread" discrimination dating back at least to the beginning of the century. JA 374, 404. Second, it describes in detail the reasons why "arbitrary" age bias is entrenched: pervasive irrational employer stereotypes, conscious and unconscious, discounting the capacity of older workers to perform on the job. *Id.* 368-73. Further, the perpetuation rationale fails to account for the fact that Title VII addresses characteristics in such a way as to cover all workers, including whites, males, and other groups that have not been victimized by entrenched, historic patterns of invidious discrimination.

Moreover, whether or not stereotypes are rooted in history is irrelevant to the debilitating effect those stereotypes have on older persons. Although ageism may be primarily a twentieth century phenomenon, stereotypes about older persons are ingrained and commonplace in our society. The perpetuation rationale also loses much of its appeal as time marches on and age discrimination remains a pervasive force in our society. The ADEA was enacted 35 years ago, yet, age discrimination in employment continues to impede the achievement of equality in the work place.[27/] "Like racism and sexism, ageism remains recalcitrant, even if below the surface. But it can be – and has been – churned up from its latent position."[28/]

CONCLUSION

In *McKennon v. Nashville Banner Publishing Co.*, the Court declared that "Congress designed the remedial measures in [the

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[27/] *See, e.g.*, Robert Manor & T. Shawn Taylor, *Age-Bias Complaints Up Sharply Older Workers' Higher Salaries are Big Targets for Employers*, CHICAGO TRIBUNE, July 15, 2001, at C1; Stan Hinden, *Forced to Retire Before You're Ready The Merge-and-Downsize Era's Layoffs Hit Older Workers Especially Hard*, WASH. POST, June 6, 1999, at H01.

[28/] Robert N. Butler, "Dispelling Ageism: The Cross-Cutting Intervention," 503 THE ANNALS 138, 140 (1989).

ADEA and Title VII] to serve as a 'spur or catalyst' to cause employers 'to self-examine their employment practices and, to endeavor to eliminate, so far as possible, the last vestiges' of discrimination." 513 U.S. at 358 quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975). Without the disparate impact theory to challenge subtle forms of age discrimination, employers will not be encouraged to examine policies which adversely effect older workers, but instead will continue to ignore them so that rather than being eliminated, the last vestiges of age discrimination will likely become entrenched "operat[ing] to 'freeze' the status quo of prior discriminatory employment practices." *Griggs*, 401 U.S. at 430.

For the foregoing reasons, *amici curiae* respectfully submit that the judgment of the United States Court of Appeals for the Eleventh Circuit should be reversed. *Amici* urge this Court to rule that the disparate impact theory of proof is applicable to the ADEA.

Respectfully submitted,

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January 24, 2002

APPENDIX

APPENDIX

Founded in 1915, the American Association of University Professors (AAUP) is an organization of approximately 45,000 faculty members and research scholars in all academic disciplines. Among the AAUP's central functions is the development of policy standards covering academic freedom, tenure, institutional governance, freedom from discrimination, and other key issues in higher education. *See, e.g., On Discrimination* and *1940 Statement of Principles on Academic Freedom and Tenure,* AAUP Policy Documents & Reports (9th Ed., 2001). As this Court has recognized, AAUP's policies are widely respected and followed as models in American colleges and universities. *See, e.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 579 n. 17 (1972); *Tilton v. Richardson,* 403 U.S. 672, 681-82 (1971). AAUP and its members are deeply concerned that the unavailability of the disparate impact method of proof under the Age Discrimination in Employment Act (ADEA) would undermine the ability of professors to ensure freedom from age discrimination in the academic workplace.

The National Association for the Advancement of Colored People (NAACP), established in 1909, is the nation's oldest civil rights organization. It has state and local affiliates throughout the nation. The fundamental mission of the NAACP is the advancement and improvement of the political, educational, social and economic status of minority groups; the elimination of racial prejudice; the publicizing of adverse effects of racial discrimination; and the initiation of lawful action to secure the elimination of racial bias. The NAACP has appeared as both plaintiff and *amicus curiae* before this Court and other courts throughout the nation in numerous civil rights cases.

The National Council of La Raza (NCLR) is the largest national Latino civil rights organization, which is an "umbrella organization" for more than 270 local affiliated community-based organizations (CBOs) and about 33,000 individual associate members. In addition to providing capacity-building assistance to our affiliates and essential information to our

individual associates, NCLR serves as a voice for all Hispanic subgroups in all regions of the country. As a civil rights organization, NCLR is vitally concerned with the maintenance of a strong, vigorous, and active federal civil rights enforcement system. NCLR believes that the proper use of the disparate impact standards is essential to protecting Hispanics, older workers, and other groups covered by Title VII of the Civil Rights Act and other laws prohibiting employment discrimination, from bias in the workplace.

The American Jewish Congress is an organization of American Jews that seeks to protect fundamental constitutional freedoms, particularly the civil rights and liberties of American Jews and all Americans. Since Jews in America are an aging population, the American Jewish Congress is particularly concerned with issues that affect the welfare of older Americans. In this connection it has called attention to such problems as nursing home abuses, problems with Medicare, and issues involving the effectiveness of various state agencies administering laws banning age discrimination; and has filed briefs in this Court in such cases as *Cruzan v. Director, Missouri Department of Health.*

The National Partnership for Women & Families, a non-profit, national advocacy organization founded in 1971 as the Women's Legal Defense Fund, promotes equal opportunity for women, quality health care, and policies that help women and men meet both work and family responsibilities. The National Partnership has devoted significant resources to combating sex, race, and other forms of invidious workplace discrimination and has filed numerous briefs *amicus curiae* in the U.S. Supreme Court and in the federal circuit courts of appeal to advance the opportunities of women and minorities in employment.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as amicus curiae in numerous cases involving employment law and civil rights issues.